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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BARBARA JOHNSON, Petitioner,

v.

ALLYN & BACON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BARBARA C. JOHNSON
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August 27, 1984

QUESTION PRESENTED FOR REVIEW

Whether a Title VII plaintiff alleging unlawful employment discrimination because of her sex is entitled to analysis of the proof presented and the findings of fact made by the trial judge under both the "disparate treatment" and the "disparate impact" theories of law.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The petitioner, Barbara C. Johnson, respectfully prays that a writ of certiorari issue to review the Decision and Order of Court of the United States Court of Appeals for the First Circuit.

The caption above contains a list of all parties in the Court of Appeals whose judgment is sought to be reviewed.

Opinions Below

The Decision of the Court of Appeals has been published at 731 F.2d 64 (1st Cir. 1984). A copy of that Decision appears in the Appendix hereto. A copy of the Order of Court from the Court of Appeals, not yet reported, appears in the Appendix hereto. A copy of the Memorandum and Order of Dismissal of the United States

District Court for the District of Massachusetts, not yet reported, appears in the Appendix hereto.

Jurisdiction

The Decision of the Court of Appeals for the First Circuit, entered on March 29, 1984, affirmed the judgment of the United States District Court for the District of Massachusetts. The District Court's Memorandum (of Decision) dated September 3, 1982 entered on that day. The District Court's Order of Dismissal dated September 8, 1982 entered on that date. The Court of Appeals denied a timely petition for rehearing by an Order of Court entered on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1244(1).

Statutory Provisions Involved

"It shall be an unlawful employment practice for an employer—

(1) ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ... ; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... sex ... 15 U.S.C. §2000e-2(a).

Statement of the Case

The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2000e-15 and under 28 U.S.C. §1343(4). The petitioner was the plaintiff in the District Court and the appellant in the Court of Appeals. In her complaint, the petitioner alleged several acts of unlawful sex-based discrimination against her by her employer, the respondent, Allyn & Bacon. Only one of those acts was pressed by the petitioner in her appeal to the Court of Appeals and that is the one at issue here.

The District Court found against the petitioner with respect to all of the unlawful sex-based discriminatory acts she alleged. The District Court generally found that the petitioner made out a prima facie case with respect to the unlawful discriminatory acts alleged but that she failed to show the respondent *intentionally*

discriminated against her. As a result her claims against the respondent were dismissed under the "disparate treatment" theory found by courts in Title VII.

However, the evidence was, and the District Court found, that with respect to promotion to the position of Series Editor, which petitioner claimed she was unlawfully denied because of her sex, there were two requirements: (1) that an applicant be a college graduate; and (2) that an applicant have previous sales experience. Respondent had previously waived a like college degree requirement for the petitioner in connection with other positions she held with the respondent (she was in fact only a few credits short of those necessary for graduation from Bennington College). Further, the petitioner proved, and the court found that Allyn & Bacon "in large part excluded women from its sales force and, as a result, from series editorial positions." (District Court Memorandum, p. 13).

Despite this explicit finding, the District Court found against the petitioner on her allegations concerning respondent's failure to promote her to the position of Series Editor. The rationale for the District Court's finding against the petitioner was "disparate treatment" analysis under Title VII. The District Court squarely held "plaintiff has failed to meet her burden of proof on this claim," that burden being to show the respondent *intentionally* discriminated against the petitioner (District Court Memorandum, p. 5).

On appeal, the petitioner principally pressed only this issue. She urged that she was entitled to a District Court finding in her favor on the basis of "disparate impact" analysis under Title VII, also court established. Briefly stated, the petitioner argued that she proved and the court found that the purportedly facially neutral policy requirement that a candidate for the position of Series Editor at Allyn & Bacon have sales experience was a cynical mask for unlawful sex discrimination because in fact women were not appointed to sales positions at Allyn & Bacon and therefore were excluded from the position of Series Editor.

The Court of Appeals in its Opinion did not address the merits of this contention of the petitioner. Instead, it surveyed the case as a

whole and discussed issues not pressed on appeal by the petitioner. With respect to the issue of respondent's failure to promote petitioner to the position of Series Editor and the "disparate impact" analysis of that issue petitioner claimed she was entitled to, the Court of Appeals dismissed her position out of hand, without reaching the merits, because "a legal issue or theory not presented to the trial court cannot be raised for the first time on appeal."

In its Order of Court in response to a petition for rehearing, the Court of Appeals did address the merits of petitioner's argument that she was entitled to "disparate impact" analysis under Title VII of respondent's failure to promote her to the posiiton of Series Editor. Petitioner's position was based squarely on the trial judge's findings of fact that "I find it hard to escape the conclusion that the company in large part excluded women from its sales force and, as a result, from series editorial position." Petitioner's petition for rehearing was denied, essentially for the same reason it had previously been denied: "A district court does not have to analyze an employment discrimination case under *both* theories when only one of them is asserted by the claimant and no proof is adduced at trial to enable the court to adequately analyze the case under the other." The Court of Appeals said, in effect, that because she did not plead "disparate impact" or try the case on a "disparate impact" theory, petitioner could not claim the advantage of the "disparate impact" theory even though the court had explicitly found respondent used a facially neutral policy to exclude women from sales positions and, a posteriori, from Series Editorships.

The Court of Appeals also rejected petioner's position that she had in fact raised the "disparate impact" theory in those very words in her amended complaint because her "motion for leave to file an amended complaint was never granted." While this is true, that motion was never denied and the trial judge established on the record the rule that he would take evidence under the allegations of the amended complaint until such time as there was an objection to him doing so (which there never was), at which time he would rule on the motion. Thus, the petitioner quite reasonably proceeded on the basis the amended complaint was in effect for purposes of defining the boundaries of the proof in the case. That is the way the

case was tried and that is the way the proof was received. It was precisely this approach that allowed the trial judge to make the findings of fact the petitioner relies on.

Reasons for Granting the Writ

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER APPLICATION OF THE DISPARATE IMPACT THEORY OF LAW

Where the trial court has made findings of fact that it was a condition of promotion to the position of series editor that the candidate have sales experience and that the respondent excluded women from its sales force and as a result from the position of series editor, the petitioner was entitled to have such findings of fact assessed under the "disparate impact" theory of law. *Teamsters* v. *United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). *Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). *Furnco Construction Corporation* v. *Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). *Connecticut* v. *Teal*, 457 U.S. 440, (1982), 102 S.Ct. 2525, 2531, 73 L.Ed.2d 130. *Grano* v. *Department of Development of City of Columbus*, 637 F.2d 1073, 1079 (6th Cir. 1980). *Lee* v. *Russell County Board of Education*, 684 F.2d 769 (11th Cir. 1982).

In her complaint, the petitioner alleged she "opposed certain unlawful practices by defendant . . . by seeking promotion to a level which she was and is qualified to fill, but which had never previously been filled or held by a woman." (Complaint, ¶7). She prayed that she be "promoted retroactively to the position she would have occupied but for the unlawful discrimination against her on account of her sex." (Complaint, Prayer for Relief, ¶4). In her amended complaint, she alleged respondent engaged in "discriminatory patterns and practices of employment in that it maintained . . . promotion practices which had a disparate impact on females and in particular on plaintiff . . ."

Petitioner's motion to amend the complaint came before the trial judge unacted upon (although much earlier filed) at the beginning of the trial. The trial judge did not want to prejudice the defendant

by requiring that it defend against allegations there might be in an amended complaint it might not have anticipated meting but, on the other hand, he did not wish to prejudice the plaintiff from proving her case in view of the strong policy of the law that amendment of a complaint is liberally to be allowed, even to the point of amending it after trial to conform to the evidence actually adduced at trial. As a result, the trial judge chose not to rule on the motion to amend the complaint but agreed instead he would hear evidence bounded by the allegations of the amended complaint until such time as the respondent objected, at which time the trial judge would rule on the motion. In the event, there were no such objections, the evidence came in, there was no necessity to rule on the motion, and the court, based on that evidence, made as findings of fact the following: "In sorting out this conflicting testimony and the varying assertions concerning defendant's hiring and promotion policies in regard to sales and series editorial positions, I find it hard to escape the conclusion that the company [Allyn & Bacon] in large part excluded women from its sales force and as a result from series editorial positions." (Memorandum, page 13).

The serious issue arose when the petitioner appealed from the determination of the trial court that she failed to carry her burden with respect to her allegations of discrimination in connection with the series editor position because she did not persuade the court that the respondent's actions were intentionally discriminatory (as required by "disparate treatment" analysis but not as required by "disparate impact" analysis, which in fact would shift the burden to the defendant to show some legitimate business justification (which Allyn & Bacon did not and could not do) for excluding women from sales positions and thus from series editor positions at Allyn & Bacon.

The cases relied upon by the Court of Appeals essentially deal with situations, unlike here, where a party on appeal wishes to introduce new evidence into the case on appeal and on the basis of that new evidence to assert a new theory of the case. Here, the situation is quite different. The trial court findings of fact mean that a facially neutral policy (the requirement of sales experience) was in fact a ruse to keep women out of series editorships because

Allyn & Bacon did not provide sales experience for their women employees. This issue, therefore, merited scrutiny under the "disparate impact" theory. *Griggs* v. *duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). *Teamsters* v. *United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). *Pullman-Standard* v. *Swint*, 456 U.S. 273, 102 S.Ct 1781, 72 L.Ed.2d 66 (1982).

The Court of Appeals, however, did not embrace this view. Its position of necessity implies that the petitioner had some sort of obligation to mention the words "disparate impact" in her complaint and to have said the words "disparate impact" when defendant's counsel mentioned "disparate treatment" in colloquy on the record with the trial judge before the trial began and in his closing argument (these are the situations the Circuit Court refers to on page 3 of its Order of Court).

Disappointing as is this result for the petitioner, it also puts the First Circuit in conflict with other circuit courts on this issue and it is precisely for this reason that petitioner seeks review in this Court. In addition, petitioner seeks review here because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings with respect to amending complaints, even after trial, an to the role of findings of fact in the judicial process as to call for an exercise of this Court's power of supervision.

In the First Circuit's view, it is apparently not enough for a plaintiff to allege facts that will support "disparate impact" analysis if she wishes such analysis applied to the findings of fact made by the court on the basis of the evidence received at trial. She must somehow specify that theory, that is elect it (not necesarily to the exclusion of other theories of recovery) if she is to avoid the judgment that since it was not clearly specified as an appropriate legal theory in so many precise words, she has somehow waived recovery under that legal theory even though the court's findings of fact support analysis under it.

The holdings of the Fourth Circuit, for example, are very different: "There has also been some confusion as to whether the claims are properly to be analyzed under the 'disparate treatment' test ... or under the 'disparate impact' test ... the district court

employed primarily a disparate treatment analysis of the proof . . . On appeal the parties have eventually joined issue under both modes of analysis, and it is on this basis that we review the district court judgment. If any doubt has existed about the appropriate way to assess Title VII claims that seek to invoke both 'disparate treatment' and 'disparate impact' theories as alternative grounds for relief, *Furnco* . . . has made it clear through the mode of analysis employed in that case that these are rightly treated simply as alternative theories upon which a right to relief under Title VII may be established in a given case . . . Obviously, as alternative theories and not separate claims they may not be applied to establish multiple violations on the same facts, but short of this *no procedural election between* them *is required of a claimant at either pre-trial, trial, or appellate stages. On this basis, we analyze the claims . . . under both theories.*" *Wright* v. *National Archives & Record Service*, 609 F.2d 702, 711 (4th Cir. 1979) [emphasis added] [citing *Furnco Construction Corporation* v. *Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978)]. Accord, *Burwell* v. *Eastern Air Lines, Inc.* 633 F.2d 361, 369 (4th Cir. 1980) ("Either theory may, of course, be applied to a particular set of facts."), *E.E.O.C.* v. *Ford Motor Co.*, 645 F.2d 183, 196-197 (4th Cir. 1981) ("in any given case, disparate treatment and disparate impact may serve as alternative theories upon which a right to relief may be established"), *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1184-1185 (4th Cir. 1982). ("parties . . . are entitled to have considered alternative and even inconsistent theories"). See also *Brown* v. *ASD Computing Center*, 519 F.Supp. 1096, 1110 (S.D. Ohio, W.D. 1982). ("Although Plaintiff is not required to choose between disparate impact and disparate treatment theories, the Court is entitled to consider whether either or both theories are presented by the evidence").

As this Court has said: "Both intentional discrimination and policies neutral on their face but having discriminatory effect may run afoul of ¶ 703(a)(2) [of Title VII]. *Nashville Gas Co.* v. Satty, 434 U.S. 136 (1977), 141, 54 L.Ed.2d 356, 363, 98 S.Ct. 347 [citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)]. The test is not whether a particular theory of law is

alleged in so many words. The test, rather, is whether sufficient facts have been alleged to make application of a particular theory of law appropriate. Where, as here, the court has made findings that a facially neutral policy in fact has a discriminatory impact, in the particular circumstances relevant here, the petitioner shold be afforded appropriate relief. In this case, the First Circuit has denied such relief. In simlar circumstances, the Fourth Circuit has granted such relief. The conflict is clear. Petitioner respectfully requests this court resolve it by granting this petition for certiorari.

The petitioner also makes the following brief observations relating to the Decision and Order of Court of the Circuit Court. The findings of the trial judge are in fact unambiguously causal: Sales experience is an apparently facially neutral selection criterion for the position of series editor. But Allyn & Bacon excludes women from its sales force. "*As a result*," Allyn & Bacon excludes women from the position of series editor, It could hardly be more clear that the trier of fact found that the apparently neutral selection criterion caused the sexual imbalance in Allyn & Bacon's sales force and series editorial staff in the circumstances that were indeed proved in the District Court, namely that women were excluded from that sales force. The relationship is direct, and, more to the point, was explicitly found to be so by the trial judge.

Conclusion

For these reasons, a writ of certiorari should issue to review the Decision and Order of Court of the First Circuit.

Respectfully Submitted,

Barbara C. Johnson

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August 27, 1984

United States Court of Appeals
For the First Circuit

Nos. 82-1886
83-1048

BARBARA C. JOHNSON
Plaintiff, Appellant,

v.

ALLYN & BACON, INC.,
Defendant, Appellee.

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Robert E. Keeton, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Bownes, *Circuit Judge*,
and Perez-Gimenez,* *District Judge*.

Edward J. Collins for Barbara C. Johnson.
John D. Canoni, with whom *Townley & Updike* was on brief, for Allyn & Bacon, Inc.

March 29, 1984

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*Of the District of Puerto Rico, sitting by designation.

PEREZ-GIMENEZ, *U. S. District Judge*. Barbara C. Johnson appeals from a decision of the United States District Court for the District of Massachusetts. Robert E. Keeton, Judge, entered September 3, 1982, denying relief for alleged acts of sex discrimination which she claims were committed against her by defendant-appellee, Allyn & Bacon, Inc., (Allyn & Bacon) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq*. (1976). Specifically, Johnson alleges that she was discriminated against because of her sex in connection with (1) her application for promotion to the position of Senior Production Editor; (2) her application for promotion to the position of Production Manager; (3) her application for promotion to the position of Series Editor; (4) the disparity in salary between whas she was paid as a Basic Books Editor and what a Series Editor was paid for allegedly comparable work; and (5) her dismissal from Allyn & Bacon.[1] Moreover, Johnson argues in her brief that the district court erred in treating the case entirely as a "disparate treatment" case instead of applying the "disparate impact" theory to some of her claims. For the reasons set forth below, we affirm the decision of the district court.

I. Facts

Appellee, Allyn & Bacon, is a Delaware corporation that

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1. In her brief, appellant does not go much further than merely to state that for purposes of her appeal she claims violation of 42 U.S.C. §2000e, *et seq*. in connection with the allegations enumerated above. Only with respect to the allegation of discriminatory termination does she attempt to explain why the district court erred as a matter of law in disallowing her claim. With respect to appellant's claim of discrimination in the failure to promote her to the position of Series Editor, appellant argues that the court below erred in applying "disparate treatment" analysis when instead it should have applied the "disparate impact" theory. With respect to the other two promotion claims, Johnson merely asks the court to draw an inference of discrimination against her from the trial court's conclusion that Allyn & Bacon excluded women from certain positions within the company a conclusion which in itself was drawn from statistical evidence concerning the sexual composition of Allyn & Bacon's sales force, but which the court found inadequate to support a showing of intentional discrimination. With respect to the claim of disparity in salary, Johnson merely repeats the same claim the district judge discredited below without any effort to show that finding was eroneous. In effect, Johnson makes little or no effort to show that the district court drew the wrong conclusions from the evidence before it.

maintains offices and facilities in Massachusetts, where it publishes textbooks. Appellant, Barbara Johnson, was hired by Allyn & Bacon on April 10, 1972, as a Production Editor for scientific and technical books in the College Editorial Department, at a salary of $10,500 per year. Johnson's duties included copy editing, proof editing and obtaining illustrations for books, and she worked primarily on math and science texts. On August 1, 1973, she was promoted to the newly created position of Basic Books Editor for technical books, and her salary increased from $11,525—to which it had grown as a result of cost of living and merit raises—to $12,600. Appellant herself was greatly responsible for creating the Basic Books Editor position at Allyn & Bacon and for outlining its contours. As a Basic Books Editor, Johnson worked closely with authors in the writing and editorial process to help them develop marketable manuscripts and iron out problems before the manuscripts went to production editors.

On October 3, 1974, Johnson was put on probation by William Bokerman, Production Manager for Allyn & Bacon's College Editorial Division, and her immediate superior. Bokerman sent Johnson a memorandum (dated October 21, 1974) explaining that her probation resulted from her disruptiveness within the company—*i.e.*, her "public disputes with supervisors, production editors, and designers, as well as with individuals outside the department and the company", coupled with her "inability or unwillingness to restrain (sic) from subjecting [her] co-workers to marathon one-sided conversations. . . ." The probation period was to last three months, during which time Johnson could receive no promotions or salary increases. On January 17, 1975, shortly after the probation period ended, Johnson was dismissed from Allyn & Bacon. In the termination letter, Bokerman informed her that since the probation period began she had "been involved in a number of incidents that [had] convinced [him] that [her] continued employment with Allyn & Bacon [was] no longer tenable."

Thereafter, Johnson filed a complaint with the Massachusetts Commission Against Discrimination (MCAD), on January 21, 1975, claiming unlawful discrimination in her firing. The MCAD charge was docketed with the Equal Employment Opportunity

Commission (EOC) on January 28, 1975, and on February 20, 1975, Johnson filed an amended charge with the EEOC, also claiming sex discrimination. On August 12, 1976, the MCAD issued a finding of lack of probable cause stating that "(t)here is no evidence to sustain [Johnson's] contention that sex was the reason for her termination" and dismissed her complaint. After a further investigation, the MCAD sustained the lack of probable cause finding on February 8, 1977. On August 4, 1977, the District Director of the EEOC issued a determination dismissing Johnson's charge, stating "there is not reasonable cause to believe that the charge is true." As required by EEOC regulations, the District Director issued Johnson a Notice of Right to Sue in the United States District Court.

On October 31, 1977, Johnson filed this action. She alleged in the complaint[2] deprivation of rights secured by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.S. §2000e, *et seq.*, claiming that she was the victim of unlawful sex discrimination in the terms and conditions of her employment and that she was dismissed in retaliation for her opposition to the company's discriminatory practices. The court's jurisdiction was invoked pursuant to 42 U.S.S. §2000e-5(f) and 28 U.S.C. §1343(4).

A twelve-day bench trial was held before Judge Keeton during parts of June, July and August of 1982. Twenty witnesses testified producing a lengthy transcript, and the parties submitted over sixty written exhibits. On September 3, 1982, the district court issued a memorandum opinion finding against Johnson and for Allyn & Bacon on the merits of all of Johnson's claims, and ordering the action dismissed.[3] In his very detailed and well-

2. The original complaint in this case was filed on October 31, 1977. Subsequently, on November 1, 1979, two years after the action was filed, Johnson filed a motion pursuant to F.R.Civ.P.15(a) for leave to file an amended complaint. The district judge heard argument on said motion on December 12, 1979, but deferred ruling on it. The motion was never granted. On the first day of the trial of the case, June 22, 1982, Johnson requested a ruling on her motion to file an amended complaint, and Allyn & Bacon entered its objection. Allyn & Bacon's objection to the introduction of any proof outside the scope of the original complaint was sustained.

3. Judge Keeton's memorandum opinion is unofficially reported at 30 EPD, Par. 33,065.

reasoned memorandum opinion, Judge Keeton summarized Johnson's contentions as follows:

> (1) that she was qualified for, applied for, and was denied the position of Senior Production Editor, after which the position remained open and then was filled by a less qualified man; (2) that she was qualified for, applied for and was denied the position of Production Manager, after which the position remained open and then was filled by a less qualified man; (3) that as a Basic Books Editor she requested and was denied pay increases and certain benefits and work conditions that would have made her pay, benefits, and conditions comparable to those of men doing similar work; (4) that she wished to apply for a sales position, but was told that the company did not hire women in sales positions, and that she was also unable to obtain a series editorial position because of her sex; (5) that she was placed on probation and then terminated because of her requests for comparable pay, benefits and conditions and because, in general, she was an aggressive woman who would not accept A & B's unlawful discrimination against her.

Judge Keeton went on to hold that Johnson had not proven a Title VII violation in that she had failed to carry her burden of persuading the court that Allyn & Bacon's actions were motivated by a discriminatory animus. Specifically, the court found that Johnson failed to show that the reasons advanced by Allyn & Bacon for its actions were pretextual. As to Johnson's claims of disparity in salary, Judge Keeton further found that she failed even to establish a *prima facie* case of discrimination, *i.e.*, unequal treatment.[4] Subsequently, the district court entered an order dismissing Johnson's actions.[5] This appeal followed.

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4. The district judge also found that Johnson failed to even establish a *prima facie* case that Allyn & Bacon discriminatorily denied her a sales position—a position which was usually seen as a prerequisite to serving as a Series Editor.

5. The order of dismissal was entered by the Clerk of the court on September 8, 1982. Thereafter, Johnson filed a motion for a new trial under F.R.Civ.P. 59 and a motion to amend the district court's findings and judgment under F.R.Civ.P. 52. on October 25, 1982, Judge Keton issued a procedural order denying Johnson's motions. On November 30, 1982, a final order was entered dismissing the case.

II. Standards of Disparate Treatment Claims

The central focus of a court confronted with a Title VII sex discrimination case is whether the employer is treating "some people less favorably than others because of their ... sex." *Teamsters* v. *United States*, 431 U.S. 324, 335, n.15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). To succeed in such a case the plaintiff must prove that he or she was discriminated against. *2See*, *Teamsters*, *supra* (where a pattern or practice of discrimination is shown, each member of the discriminated-against class is presumptively entitled to relief, but individual relief may be granted only on an individualized finding of discrmination).

In determining whether Johnson was discriminated against, the district court correctly applied the analytical framework provided by *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973). Under *McDonnell Douglas*, a plaintiff asserting a disparate treatment discrimination claim must first establish a *prima facie* case of discrimination by a preponderance of the evidence. If he or she succeeds, the defendant must articulate a legitimate, non-discriminatory reason for its challenged actions. If defendant does so, plaintiff is then given the opportunity to prove by a preponderance of the evidence that the asserted reason is a mere pretext for unlawful discrimination.[6] *See*,

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Ft. no. 5 cont.

Johnson filed a premature notice of appeal from Judge Keton's October 25, 1982, order on November 24, 1982. This became No. 82-1886. On December 29, 1982, Johnson filed a scond notice of appeal from the November 30, 1982, final order. This became No. 83-1048. The two appeals were consolidated by this court's February 1, 1983 order.

6. Johnson argues that she is not subject to the *McDonnell Douglas* test because she has presented her claim with "direct evidence", *citing Lee* v. *Russell County Board of Education*, 684 F.2d 769, 774 (11th Cir. 1974) ("Where strong, direct evidence is presented, reliance on *McDonnell Douglas* as the exclusive means of proving the case and as the proper form of rebuttal is incorrect."). Whether or not we might follow *Lee's* analysis in another case, it clearly has no application here, for plaintiff's case was neither made out nor proved by direct evidence. The evidence Johnson calls "direct", entitling her to a different test of discrimination, is merely statistical, which is generally considered "merely a species of *circumstantial* evidence." *Davis* v. *Califano*, 613 F.2d 957, 962 (D.C.Cir. 1979) (emphasis added). According to *Lee*, the *McDonnell Douglas* test was "designed to focus the inquiry where circumstantial evidence is relied on." 648 F.2d, at 774.

Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248, 252-3, 101 S.Ct. 1089, 1093, 67 L.ed.2d 207 (1980) *(citing McDonnell Douglas Corp.* v. *Green, supra)*; *Lamphere* v. *Brown University*, 685 F.2d 743, 748 (1st Cir. 1982); *Holden* v. *Commission Against Discrimination of the Commonwealth of Massachusetts*, 671 F.2d 30, 35-36 (1st Cir. 1982); *T & S Service Assoc., Inc.* v. *Crenson*, 666 F.2d 722, 725-27 (1st Cir. 1981).

In *McDonnell Douglas, supra*, the Supreme Court laid down the standards for establishing a *prima facie* case of illegal discrimination. The plaintiff must show by a preponderance of the evidence: (1) that he or she is within a class protected by Title VII; (2) that he or she applied for a job for which the employer was seeking applicants and for which he or she had the requisite qualifications; (3) that he or she was rejected; and (4) that the employer continued to seek applicants with his or her qualifications. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979); *Correa* v. *Nampa School District No. 131*, 645 F.2d 814, 816 (9th Cir. 1981), *citing McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Needham* v. *Beecham*, 515 F.Supp. 460, 468 (D.Me. 1981). In *Texas Department of Community Affairs* v. *Burdine*, the Supreme Court explained that a complainant's initial burden of establishig a *prima facie* case of disparate treatment is not onerous. 450 U.S. at 253-254, 101 S.Ct. at 1094. In fact, the court has gone further and has stated that:

> (w)here the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff".

United States Postal Service Board of Governors v. Aikens, ___ U.S. ___, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). This statement by the court prompted the Court of Appeals for the Second Circuit to conclude that, under *Aikens*, a reviewing court "need not linger long over the question of whether [the plaintiff] in fact established a *prima facie* case" if the defendant has met its burden of articulating a legitimate non-discriminatory reason for

its actions. *Sweeney* v. *Research Foundation of State University of New York*, 711 F.2d 1179, 1184 (2nd Cir. 1983). Instead, the reviewing court may focus on "the ultimate question of discrimination *vel non*." *Id.* We adopt the Second Circuit's reasoning.

In order to meet plaintiff's *prima facie* case, the defendant does not have to prove the absence of a discriminatory motive; it only has to "articulate" a legitimate, non-discriminatory reason. *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24, 25, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978), *rev'g*, *Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir. 1978) (*Sweeney I*); *Lamphere* v. *Brown University*, *supra*. The defendant's burden to "articulate" a legitimate reason is *not* a burden to persuade the court that he was in fact motivated by that reason and not by a discriminatory one. "Rather, it is a burden of *production—i.e.*, a burden to *articulate or state* a valid reason." *Loeb* v. *Textron, Inc.*, 600 F.2d at 1011. The defendant can accomplish this by introducing "admissible evidence which would allow the trier of facts rationally to condlude that the employment decision had not been motivated by a discriminatory animus." *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. at 257, 101 S.Ct. at 1096. Defendant's burden of production can be met if the evidence presented by him setting forth the reasons for rejection of the plaintiff "raises a genuine issue of fact as to whether [defendant] discriminated against the plaintiff." *Id.* at 254-255, 101 S.Ct. at 1094. Finally, the defendant's explanation of its reasons must be clear and reasonably specific. *Id.* at 258, 101 S.Ct. at 1096, citing *Loeb* v. *Textron, Inc.*, 600 F.2d at 1011-12 n.5.

Once the employer has met its burden, the plaintiff "must have an opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. That is, the plaintiff, to prevail, must prove by a preponderance of the evidence that the employer's proferred reason was not the true reason for the employment decision in question, but was a pretext for discrimination. *Lamphere* v. *Brown University*, 685 F.2d at 748; *Loeb* v. *Textron, Inc.*, 600 F.2d at

1014. Plaintiff's burden of proving pretext

> merges with the ultimate burden of *persuading* the court that she has been the victim of intentional discrimination. [Plaintiff] may succeed in this either *directly* by persuading the court that a discriminatory reason more likely motivated the employer or *indirectly* by showing that the employer's proffered explanation is unworthy of credence.

Texas Department of Community Affairs v. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1094, *citing McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 804-5, 93 S.Ct., at 1825 (emphasis added). Therefore, the burden of *persuasion* as to the ultimate issue—whether defendant intentionally discriminated against plaintiff on the basis of sex—remains at all time with the plaintiff. *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093; *Lamphere* v. *Brown University*, 685 F.2d at 748; *Sweeney* v. *Board of Trustees of Keene State College*, 604 F.2d 106, 108 (1st Cir. 1979) (*Sweeney II*), *cert. denied*, 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731 (1980); *Loeb* v. *Textron, Inc.*, 600 2d at 1011.

Before reviewing the district court's findings in light of the preceding legal framework, we note that our standard of review is whether the district court's findings of fact were clearly eroneous or predicated upon an error of law. *Lamphere* v. *Brown University*, 685 F.2d at 748; *Hilton* v. *Wyman-Gordon Co.*, 625 F.2d 379, 383 (1st Cir. 1980); *Sweeny II*, 604 F.2d at 109 n.2. We have specifically emphasized that the issue of whether a party was a victim of sex discrimination is a question of mixed law and fact subject to the clearly erroneous standard of review of F.R.Civ.P. 52(a). *Manning* v. *Trustees of Tufts College*, 613 F.2d 1200, 1203 (1st Cir. 1980), *citing Sweeny II*, 604 F.2d at 109 N.2. This was also the express holding of the Supreme Court of the United States in *Pullman-Standard* v. *Swint*, 456 U.S. 273, 290, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) ("a court of appeals may only reverse a district court's findings on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a)"). Thus, "to prevail [on the] contention that the district court drew the wrong conclusion from the evidence before it, appellant must show that the district court's conclusion had no reasonable support." *Manning*, *supra*, at 1203.

III. Particular Claims of Discrimination

Appellant makes a number of specific claims of discrimination.[7] We will deal with each claim separately. First, Johnson alleges that she applied for and was denied for discriminatory reasons the position of Senior Production Editor. The district court found that she stated a *prima facie* case, but that Allyn & Bacon had a legitimate, non-discriminatory reason for not hiring her for the position. Specifically, the district court found that Allyn & Bacon was interested in hiring someone with supervisory experience for the position, and Johnson had little or no such experience. Apparently, in an effort to show that Allyn & Bacon's proffered reason was pretextual, Johnson stated that she had been told that woman would not be hired for the position, and that the woman who then held the position was stepping down because of a male co-worker's inability to work with women. However, the district court found that Johnson did not prove Allyn & Bacon's reason to be pretextual and that she had failed to meet her burden of proof on this claim.

Second, Johnson alleges that she applied for and was denied for discriminatory reasons the position of Production Manager. The district court again found that she stated a *prima facie* case, but that Allyn & Bacon offered a legitimate, non-discriminatory reason for not promoting her to the position. The court found that the position of Production Manager was a high supervisory position, and Johnson lacked the supervisory skill and experience which would have made her a probable candidate for the job. The court also found that Allyn & Bacon had reason to suspect that Johnson had trouble getting along with some of the very employees that she would be called on to supervise had she been given the position. The court concluded that Johnson failed to rebut the legitimate, non-discriminatory reasons Allyn & Bacon offered for not promoting her to the position of Production Manager

Third, Johnson claims that as a Basic Books Editor she performed work which was comparable and required much of the same skills as that performed by Series Editors, but that she did not receive the same salary and benefits as the Series Editors. With

7. See, *supra*, pp. 2 & 6.

respect to this claim, the district court simply found that the positions were different since the Series Editor had the added responsibility of obtaining authors and negotiating and signing contracts with them. Johnson's own witness testified to the differences between the two positions. In addition, the district court found (1) that while it was true that Senior Series Editors received more pay than Johnson did as a Basic Books Editor, the Senior Series Editors had been with the company longer than Johnson; and (2) that Associate Series Editors received salaries that were *less* than Johnson's although the former had been with the company as long or slightly longer than her. Thus, the district court concluded that Johnson had not even established a *prima facie* case of unequal treatment, and that, in any event, she did not prove that Allyn & Bacon's proffered reasons for the allegedly differing treatment were pretextual.

Fourth, Johnson contends that she applied for and was denied for discriminatory reasons the position of Series Editor, and that she was precluded from applying for a sales position, usually seen as a prerequisite to becoming a Series Editor, because of her sex. The district court found that statistical evidence concerning the sexual composition of Allyn & Bacon's sales force and series editorial staff showed that women were excluded from sales and series editorial positions. However, citing our opinion in *Lamphere* v. *Brown University*, *supra*, the court explained that statistical evidence alone is not sufficient to prove intentional discrimination when the statistics provided are incomplete because they do not include information as to the number of qualified women in the relevant labor market. Allyn & Bacon indicated that its reasons for not promoting Johnson to the position of Series Editor, as well as to that of sales person, was Johnson's lack of qualification; namely, her lack of some sales experience and a college degree, and her inability to get along with people inside and outside of the company. The court found that Johnson, in fact, lacked the required qualifications. Thus, the court concluded that Allyn & Bacon had articulated a legitimate reason for not hiring Johnson, and that Johnson failed to prove that reason was pretextual. In effect, the court also found that since Allyn &

Bacon's stated reason was a negation of one of the elements of Johnson's *prima facie* case—*i.e.*, that she was qualified—its finding that Allyn & Bacon's reason was not pretextual was also a finding that Johnson did not establish her *prima facie* case.

Finally, Johnson alleges that she was placed on probation and later fired in retaliation for her requests for equal treatment to that received by her male co-workers. Allyn & Bacon stated that it placed on probation and later fired Johnson because she was "a disruptive influence within her department" and was unable to get along with some of her co-workers, as well as with other persons outside of the company, such as authors. The district court, based on the testimony of witnesses, documentary evidence and its own observations of Johnson during the trial, found that Allyn & Bacon's version of the facts was more credible. Thus, the court held that Allyn & Bacon provided a legitimate, non-discriminatory reason for placing Johnson on probation and then firing her, and that Johnson did not prove the stated reason was pretextual.

In her beief on appeal, Johnson contends that the district court's holding with respect to her claim of discriminatory termination was erroneous as a matter of law. We disagree. The district court correctly relied on *Correa* v. *Nampa School District No. 131*, 645 F.2d 814 (9th Cir. 1981), for the proposition that an inability to get along with people is a legitimate non-discriminatory reason for firing an employee. The finding that Johnson was unable to get along with her co-workers and authors is based upon sufficient evidence and cannot be said to be clearly erroneous.

In the instant case, the district court engaged in a probing analysis of Allyn & Bacon's evaluation process and concluded that the ultimate decisions concerning Johnson were not based on Johnson's sex. We cannot say that the findings of fact underlying the district court's conclusion are clearly erroneous. Johnson has not even attempted to show that the district court's conclusion had no reasonable support. Upon careful consideration of the briefs, the record, and the district court's opinion, we affirm the judgment entered below.

IV. Appellant's Disparate Impact Argument

Appellant Johnson argues in her brief that the district court

applied the wrong legal standard when it analyzed all of her claims under the disparate treatment theory instead of using the disparate impact approach. The problem with this argument is that this case was brought and tried under a disparate treatment theory. At no point did Johnson's trial counsel contend the disparate impact approach should be followed. On the contrary, counsel for Allyn & Bacon specifically pointed out that the case was a disparate treatment case, and no objection to Allyn & Bacon's counsel's statement was forthcoming from Johnson's counsel.

Litigants cannot try their case under one theory and then urge a remand on appeal so it can be tried again under a different theory. This is preccisely what Johnson has done. We have repeatedly held that a legal issue or theory not presented to the trial court cannot be raised for the first time on appeal. *Marcial Ucin, S.A.* v. *SS Galicia, Her Engines, Tackle, etc.*, No. 831192, Slip Op. at 20 (1st Cir. Dec. 14, 1983); *North American Industries, Inc.* v. *Feldman*, No. 83-1135, Slip Op. at 3-4, n.1 (1st Cir. Dec. 5, 1983); *Greenwich Federal Savings & Loan Association* v. *Fidelity Bond & Mortgage Co.*, 714 F.2d 183, 184 (1st Cir. 1983); *Goldman* v. *Sears, Roebuck & Co.*, 607 F.2d 1014, 1017 (1st Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); *Furtado* v. *Bishop*, 604 F.2d 80, 87 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); *Johnson* v. *Holiday Inns, Inc.*, 595 F.2d 890 (1st Cir. 1979); *Dobb* v. *Baker*, 505 F.2d 1041, 1044 (1st Cir. 1974); *Roto-Lith, Ltd.* v. *F. P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962). Although this rule is not absolute, it is relaxed only in "horrendous cases where a gross miscarriage of justice would occur", and the new theory must be "so compelling as virtually to insure appellant's success." *Johnston* v. *Holiday Inns, Inc.*, 595 F.2d at 894. In the case at bar, we see no reason for relaxing the rule against appellate review of a position not advanced in the district court. We do not find that failure to consider Johnson's new position would result in a "gross miscarriage of justice", nor is it "so compelling as virtually to insure [Johnson's] success."[8]

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8. Our examination of the record convinces us that, even if the disparate impact theory had been followed below, Johnson failed to meet her basic requirement of proving that Allyn & Bacon employed a selection device which, although facially

V. Attorney's Fees and Costs

The only issue left for us to decide is the question of attorney's fees and costs. Appellee, Allyn & Bacon, claims we should award them attorney's fees and double costs pursuant to Rule 38 of the Federal Rules of Appellate Procedure, which provides that "just damages" and "double costs" may be awarded to an appellee if the court of appeals determines the appeal is frivolous. The term "just damages" has been interpreted to include attorney's fees in appropriate cases. *See, e.g., Harris* v. *Plastics Manufacturing Co.*, 617 F.2d 438, 440 (5th Cir. 1980).

The Supreme Court held in *Christianburg Garment Co.* v. *E.E.O.C.*, 434 U.S. 412, 421, 98 S.Ct., 694, 700, 54 L.Ed.2d 648 (1980), that a prevailing defendant in a Title VII action could be awarded attorney's fees "upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith. This holding of the Supreme Court has been held applicable to prevailing defendants-appellees. *See, e.g., Bugg* v. *Allied Industrial Workers*, 674 F.2d 595, 599-600 & n.10 (7th Cir.), *appeal dismissed* ____ U.S. ____, 103 S.Ct. 29, 74 L.ed.2d 43 (1982); *Marks* v. *Prattco, Inc.*, 633 F.2d 1122, 1125-26 (5th Cir. 1981). Moreover, in *Fischer* v. *Adams*, 572 F.2d 406, 409 (1st Cir. 1978), we noted that the time spent on an appeal in a Title VII action is also compensable as part of reasonable attorney's fees. Thus, we conclude that an appellate court may exercise its power to award attorney's fees to a prevailing defendant-appellee if the appeal is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." However, we also note that the Supreme Court, in *Christianburg Garment Co.*, cautioned that the exercise of the power to grant fees to a prevailing defendant must be made under a stricter standard than is applied

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Ft. no. 8 cont.

neutral, produced a significantly adverse impact on women. *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977). Although the statistical evidence before the court concerning the sexual composition of Allyn & Bacon's sales force and series editorial staff showed a sexual imbalance, we agree with the district court that those statistics, by themselves, are not adequate to show discrimination. *See, e.g., Lamphere* v. *Brown University*, 685 F.2d at 750; *grano* v. *Department of Development of City of Columbus*, 637 F.2d 1073, 1078 (6th Cir. 1980).

when considering awards to prevailing plaintiffs. This limitation should also extend to a defendant-appellee. *See*, *Bugg*, 674 F.2d at 600.

Evaluating the circumstances of this case, it is apparent that an award of attorney's fees to Allyn & Bacon for appellate work is not appropriate. Johnson made out several *prima facie* claims and the case could well have gone the other way if the district judge had believed her. When we consider the Supreme Court's admonition in *Christianburg* and the fact that Johnson had an appeal as of right, we do not think that this is the type of case which would normally warrant an award of attorney's fees in favor of defendant-appellee.

However, we also note that Johnson has absolutely failed to present any arguable reason why the district court erred in its disposition. She basically restates arguments that the district court properly rejected. Her additional allegation is based on a theory which was not even presented to the district court. Some penalty should attach to taking up our time with such a perfunctory appeal. Thus, we believe in the circumstances that appellee is entitled to recover double costs pursuant to F.R.App.P. 38. *See*, *Good Hope Refineries, Inc.* v. *R. D. Bradshear*, 588 F.2d 846 (1st Cir. 1978); *First National Insurance Co. of America* v. *Lynn*, 525 F.2d 1 (1st Cir. 1975); *NLRB* v. *Bedford Discountes, Inc.*, 484 F.2d 923 (1st Cir. 1973).

VI. Conclusion

The district court applied the correct legal standards and made detailed findings of fact, none of which can be said to be clearly erroneous. Thus, the decision ordering dismissal of all of Johnson's claims is affirmed. Appellee is awarded double costs.

For the foregoing reasons, the decision of the district court is hereby affirmed.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

BARBARA JOHNSON,
Plaintiff

v.

CIVIL ACTION
NO. 77-3325-K

ALLYN & BACON, INC.,
Defendant

September 3, 1982

Memorandum

The plaintiff in this action is an individual who resides in Newton, Massachusetts. Defendant Allyn and Bacon (A & B) is a Delaware corporation that maintains offices and facilities in Massachusetts where it publishes textbooks. The plaintiff was employed by the defendant from April, 1972, until her discharge in January, 1975. She brings this suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, with jurisdiction provided under 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1343(4), claiming that she was the victim of unlawful sex discrimination in the terms and conditions of her employment and that she was fired in retaliation for her opposition to the company's discriminatory practices.

A twelve-day trial on plaintiff's charges was held in the court during parts of June, July, and August of this year. Twenty witnesses testified at trial, and the parties submitted over sixty written exhibits. The bare facts of the case are as follows. The plaintiff began working for defendant on April 10, 1972 as a Production Editor in the College Editorial Department at a salary of $10,500 per year. Her duties as a Production Editor included copy editing, proof editing, obtaining illustrations for books, and

so forth, and she worked primarily on math and science texts. On August 1, 1973, she was promoted to the newly created job of Basic Books Editor, and her salary increased from $11,525, to which it had grown as a result of cost of living and merit raises, to $12,600. As a Basic Books Editor, she worked closely with authors from a fairly early point in the writing and editorial process to help the authors of introductory technical textbooks develop marketable manuscripts. On October 3, 1974, a bit more than a year after her promotion, plaintiff was put on probation by William Bokermann, the Production Manager for A & B's College Division and plaintiff's immediate superior. As explained in a memorandum that Bokermann sent the plaintiff a few weeks later (see Exhibit 35), the probation allegedly resulted from plaintiff's disruptiveness within the company—her "public disputes with supervisors, production editors and designers, as well as with individuals outside the department and the company" and her "inability or unwillingness to restrain [sic] from subjecting [her] co-workers to marathon one-sided conversations . . ." (Ex. 35). Probation was to last three months, during which time the plaintiff could receive no promotions or salary increases. On January 17, 1975, shortly after the probationary period ended, plaintiff was fired from A & B. The termination letter from Bokermann informed her that since the probation began she had "been involved in a number of incidents" that convinced Bokermann that plaintiff's "continued employment with Allyn and Bacon is no longer tenable" (Ex. 40).

Plaintiff filed a complaint with the Massachusetts Commission Against Discrimination on January 21, 1975, claiming unlawful discrimination in her firing. A month later she filed an amended charge with the Equal Employment Opportunity Commission claiming that she had been discriminated against because of her sex. On August 12, 1976, the MCAD issued a finding of lack of probable cause and dismissed her complaint. After a further investigation the MCAD sustained this lack of probable cause finding on February 8, 1977. On August 4, 1977, the District Director of the EEOC dismissed her federal administrative charge and issued a notice of her right to sue in this court. The instant suit followed on November 1, 1977, within the ninety day period

specified by the notice.

In her testimony and documentary submissions the plaintiff has made a great many specific accusations to demonstrate the sex discrimination that she claims to have experienced at A & B. The most substantial charges, which I will review individually, are the following: (1) that she was qualified for, applied for, and was denied the position of Senior Production Editor, after which the position remained open and then was filled by a less qualified man; (2) that she was qualified for, applied for and was denied the position of Production Manager, after which the position remained open and then was filled by a less qualified man; (3) that as a Basic Books Editor she requested and was denied pay increases and certain benefits and work conditions that would have made her pay, benefits, and conditions comparable to those of men doing similar work; (4) that she wished to apply for a sales position, but was told that the company did not hire women in sales positions, and that she was also unable to obtain a series editorial position because of her sex; (5) that she was placed on probation and then terminated because of her requests for comparable pay, benefits and conditions and because, in general, she was an aggressive woman who would not accept A & B's unlawful discrimination against her. As compensation for these unlawful discriminatory acts by A & B, the plaintiff requests damages including reinstatement, promotion, back pay, and out of pocket costs.

II.

In order to prevail on one or more of her claims, plaintiff must show that defendant intentionally discriminated against her on the basis of sex. *teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motivation is critical ..."). Plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence. If she succeeds, "the defendant must articulate a legitimate, non-discriminatory reason for its challenged actions. If defendant does so, plaintiff is then given the opportunity to prove by a preponderance of the evidence that the asserted reason is a mere pretext for unlawful discrimination." *Lamphere* v. *Brown University*, No. 80-1524, slip op. at 5 (1st Cir. July 22, 1982) (per curiam).

The general legal standards for establishing a prima facie case were stated by the Supreme Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). The plaintiff must show:

> (1) that he belongs to a racial minority; (ii) that he applied for and was qualified for a job which the employer was seeking applications; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

The basic elements of the prima facie case as stated in *McDonnell Douglas* have been applied to promotion claims, *see, e.g.*, *Blizard* v. *Fielding*, 572 F.2d 13, 15 (1st Cir. 1978), and discharge and retaliation claims, *see, e.g.*, *Hochstadt* v. *Worcester Foundation*, 11 FEP Cases 1426 (D. Mass. 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976). To meet plaintiff's prima facie case, the defendant must articulate a legitimate, nondiscriminatory reason for its action or lack of action. *Lamphere*, *supra*, at 5. The defendant can accomplish this by introducing "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 257 (1980). The defendant must

> clearly set forth, through the introduction of admissible evidence, the reasons for [the employment decision]. The explanation provided must be legally sufficient to justify a judgment for the defendant ... Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Id. at 255-56 (footnote omitted).

If defendant meets its burden of articulating a legitimate, nondiscriminatory reason for its actions, the plaintiff still has the

opportunity to show that the proffered reason was not the true reason for the employment decision. The plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence." *Id.* at 256.

The burden of persuasion as to the ultimate issue—whether the defendant intentionally discriminated against the plaintiff on the basis of sex—remains on the plaintiff at all times. *Lamphere*, *supra*, at 6; *Holden*, *supra*, at 52.

III.

Plaintiff claims that she applied for and was denied for discriminatory reasons the position of Senior Production Editor, Technical/Science Books. In 1972 and 1973 the Senior Production Editor supervised the editing work of a group of approximately five production editors, including the plaintiff, and a small number of less senior editors. A number of facts are in dispute here, including when the position became available and whether plaintiff actually applied for the position. Plaintiff claims that in October, 1972, six months after she started working at A & B, she learned from Mr. Amato Prudente that the Senior Production position was about to become available, and that she expressed her interest in the job but was told that a woman would not be hired for the position because a male co-worker was incapable of working with women. It was because of that co-worker, plaintiff was told, that the current Senior Production Editor, Judith Fiske, was stepping down from the position and resuming her previous position as Production Editor. Plaintiff claims that Judith Fiske stepped down in late 1972, and the position then remained vacant for a number of months until it was filled in late February, 1973, by Roger Powers, who had previously been head of the disbanded music books department in another of A & B's divisions. Plaintiff claims that Powers had no experience editing science books and as a result was incapable of providing the supervision and training required in his new position. Plaintiff testified that she herself, after unsuccessfully applying for the job, was asked to train Powers and refused to do so.

The defendant denies that plaintiff ever applied for the job, and points to the fact that Mr. Prudente was the Design Director in the College Division and was not responsible for hiring or in any way overseeing the work of the Senior Production Editor or the people working under the Senior Production Editor. The defendant also denies that the Senior Produciton Editor position remained open from late 1972 until February, 1973, and instead claims that the position was filled by Roger Powers at the moment Judith Fiske stepped down in February.

I conclude that it is not necessary to decide whether plaintiff or defendant is correct on many of these factual details—although I do find that the weight of evidence favors defendant's version in general—because of my finding that defendant has amply demonstrated that it had a legitimate reason for hiring Roger Powers rather than plaintiff for the position and plaintiff has not shown this reason to be a pretext. Wayne Barcomb, the Director of the College Division during the full period of plaintiff's employment at A & B and the person who made the actual decision about whom to hire as Senior Production Editor, testified, and I give his testimony great credibility, that he wanted to fill the position with a person who had experience supervising others, and Roger Powers, although he did not have technical book editing experience, had considerable supervisory experience. In comparison, the evidence shows that plaintiff, who had only been employed by defendant a short time when the position opened, had little or no supervisory experience.

As to plaintiff's more specific assertion that she was told by Mr. Prudente that a woman would not be hired for the position and that the woman who then held the position was stepping down because of a male co-worker's inability to work with women, I note the following. First, even if I were to believe that Mr. Prudente said exactly those things,[1] there is no evidence that Mr. Prudente was correct in his conclusions or even well-informed concerning the relevant events. Next, Judith Fiske testified that she stepped down from the Senior Editor position not because of trouble with a male

1. Mr. Prudente was not a witness at trial, nor have depositions or affidavits from him been made available to the court.

co-worker but rather because she wished to return to editing rather than supervisory work. Last, I note that all three of the Senior Production Editors in the College Division when the position was created in May, 1972, were women, and that in November, when plaintiff claims to have applied for the position, two of the three senior editors were women. Although these numbers are hardly conclusive, they certainly do not support a contention that women were excluded from the position and that plaintiff was denied the position because of her sex.

All of this is not to say that the defendant made the best decision when it appointed Roger Powers to be Senior Production Editor. Apparently Powers was not effective in the position, and he was replaced within a year. But the evidence, even were I to read it most generously to plaintiff to enable her here to meet the requirements for establishing her prima facie case, strongly supports defendant's claim that it had a legitimate reason for making the decision that it made. Plaintiff has not shown that defendant's proffered reason is pretextual. On all the evidence before me, plaintiff has failed to meet her burden of proof on this claim.

IV.

Plaintiff's next claim concerns the Production Manager position. The Production Manager was, in effect, second in command of the College Division. Only the Director of the Division, Wayne Barcomb, was superior to this person, and the various Senior Production Editors, Production Editors, and design staff—a total staff, excluding secretarial and clerical, of about thirty persons—were under the Production Manager. The position was vacant from August, 1972, when Fletcher Dalton left A & B, until May, 1973, when William Bokermann was promoted to fill it.

Plaintiff testified that in April, 1973, she applied for the job in conversations with Wayne Barcomb and that she submitted a memorandum (Ex. 2) to demonstrate ideas she had for improving the management of the department. She added that Barcomb responded that he intended to hire a man for the position, but that plaintiff would soon receive a promotion. William Bokermann, who was hired as Production Manager in May, had, plaintiff

claims, less relevant experience for the job than she herself had and, for that reason, she was requested to train him. She agreed to train Bokermann largely because of Barcomb's promise that she would soon be promoted.

Defendant has suggested, as in Section III above, that it is unclear that plaintiff ever actually applied for this position or, at least, applied for the position before plans had been made to give the job to Bokermann. Defendant denies that plaintiff trained Bokermann or that there was ever the intention to consider only a man for this position. There are also disputes between the parties concerning when Bokermann actually started at A & B, the relevance of his prior experience to the Production Manager job, whether certain promotional promises had been made to Bokermann, and so forth.

As in the section immediately above, I do not find it necessary to reolve all these factual disputes[2] because, regardless of how they are resolved, defendant has demonstrated a legitimate reason for its decision to offer the job of Production Manager to Bokermann and not to plaintiff. The job, as mentioned, was a high supervisory position. Plaintiff did not have supervisory experience. Based on conduct by plaintiff that will be discussed in Section VII below, there was also reason for management to suspect that plaintiff had considerable trouble getting along with some or many of the very employees she would be called on to supervise as Production Manager. In fact, there was probably no reason for management even to reach considerations of plaintiff's ability to get along with others, since plaintiff simply lacked the supervisory skills and

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2. here, as above, the evidence is more strongly supportive of the defense claims than of plaintiff's claims—for example, the evidence suggests that plaintiff's "application" for the job was ambiguous, and supports the claim that Bokermann was hired by A & B in July, 1972 and had been a Senior Production Editor for five months prior to becoming Production Manager, and that plaintiff did not train Bokermann but rather discussed various ideas with him as any employee might with a new supervisor. Plaintiff's suggestion that only males or a male were considered for the Production Manager's job is unsupported by any evidence other than her testimony of what she heard in one conversation, and is contradicted by the testimony of Wayne Barcomb, who made the decision to hire Bokermann.

experience which would have made her a probable candidate for the job. By comparison, the three Senior Production Editors in the spring of 1973--Louise Sullivan, Roger Powers, and William Bokermann--all stood in the company hierarchy (see Ex. 56a) between plaintiff and the desired posiiton and probably all had a stronger claim than she to be considered for the job.[3]

There may be some dispute as to how well Bokermann was qualified for the position, but I find no credible evidence to suggest that plaintiff was as well qualified as Bokermann. Moreover, testimony from many witnesses, including plaintiff's witness Feinberg, indicated that Bokermann proved his competence before appointment to the position and functioned excellently in the position.

In conclude, as in Section III above, that even if the evidence is most generouly construed to enable plaintiff to establish the prima facie case on this claim, she has failed to rebut the legitimate, nondiscriminatory reasons defendant has offered for not promoting her to the position. On all the evidence before me, plaintiff has failed to meet her burden of proof on this claim.

In mid-August, 1973, plaintiff became one of the College Division's two Basic Books Editors. She received a pay increase of approximately $1000 in the newly-created job (the contours of which she herself had helped create) assisting authors of basic introductory texts develop marketable manuscripts and iron out problems before the manuscripts went to production editors.

Plaintiff makes a number of claims concerning the terms and conditions of her employment as a Basic Books Editor. A fair summary of these claims is that the Basic Books position, as designed by A & B, turned out to be an inferior version of the existing Series Editor position, and, while the Basic Books position required the same skills and included much the same work as the Series Editor position, it lacked that latter position's pay and benefits, including the right to travel. Plaintiff has also claimed that she applied for and was denied opportunities to become a

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3. I note in this connection that plaintiff's witness Larry Feinberg testified that he assumed that one of the three Senior Production Editors would become the Production Manager.

Series Editor, and those claims will be considered in section VI below. The claim here—that her pay as Basic Books Editor and certain of her conditions of employment should have been comparable to Series Editor pay and conditions--can be disposed of quickly. The two positions were different, primarily in that Series Editors had the considerable responsibility of obtaining authors and negotiating and signing contracts with them.[4] Moreover, although the Senior Series Editors received considerably higher pay than plaintiff did as a Basic Books Editor, those senior editors were persons with many more years at the company than plaintiff (see Ex. 60). Associate Series Editors, by comparison, by and large had equal to or slightly longer time than plaintiff's at the company and received salaries that were less than plaintiff's as a Basic Books Editor. Lastly, the suggestion that the Basic Books position was designed as a dead-end for female employees of A & B is undercut by the fact that the second Basic Books editor appointed simultaneously with plaintiff was a man who had been with A & B for three years more than had plaintiff. Plaintiff and the male Basic Books Editor received the same salary[5] and, as far as is disclosed by the evidence, the same benefits, opportunities, and conditions of work.

Plaintiff has failed here even to establish a prima facie case of unequal treatment and has failed also to show that defendant's articulated reasons were pretextual.

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4. Plaintiff called Allen Workman as a witness. Mr. Workman, who had been a Series Editor, was appointed with plaintiff to be a Basic Books Editor. He testified to the differences between the jobs, including the facts that the Series Editors acquired books, negotiated author contracts, were responsible for market research, and travelled three months a year (compared to a few days travel per year for Basic Books Editors).

5. The male Basic Books Editor held a bachelor's and master's degrees (plaintiff had not completed her college studies) and had previously been a full Series Editor at A & B at a higher salary than what he and plaintiff were paid as Basic Books Editors. A reasonable inference that can be drawn from this is that plaintiff was certainly fairly treated in relation to the male Basic Books Editor, whose experience and educational credentials might have been used by the defendant to justify a higher salary for him.

VI.

Plaintiff next contends that she on numerous occasions applied for a job as Series Editor,[6] that she was rejected because of her sex, and that she was effectively precluded from applying for a sales position, usually seen as a prerequisite to serving as a Series Editor, also because of her sex.

Plaintiff testified that in late May or early June, 1974, she had a number of conversations in which she expressed her desire to become a Series Editor. She discussed it first with William Roberts, a Senior Series Editor with whom she worked closely on certain projects, and was told by him, in effect, that she could not be a Series Editor because women were not credible to authors and as a result were not made Series Editors. Within a few days of that conversation she talked with William Bokermann, the Production Manager and her supervisor, and Wayne Barcomb, the Director of the College Division, about becoming a Series Editor. Bokermann said that he would get back to her on the request. Barcomb, who was in charge of the Series Editors, told her in effect that women were not allowed to be Series Editors. These and similar conversations were, plaintiff contends, repeated in the Fall of 1974.[7] Plaintiff also testified to talking with Raymond Short, A & B's national Sales Manager, in January, 1974, in order to explore with him the possibility that she might become a sales representative. Almost all Series Editors had prior sales experience, and it was apparently plaintiff's desire to work in sales in order to prepare herself for a series editorial position. Short told her, plaintiff testified, to forget her desire to become a sales representative because A & B did not hire women as sales

7. The conversations in the Fall appear hybrid in nature, with plaintiff either asking to be made a Series Editor or asking for a large salary increase (in the range of 50%) in order to make her pay comparable to what was paid Roberts, whose work as a Series Editor she claimed was very similar to her work.

6. There is some ambiguity in plaintiff's claims. To the extent that she is claiming that the Basic Books position should have been a series editorial position, I have discussed and rejected that claim in Section V above. I consider here the claim that she applied to become a Series Editor working on basic books, and was turned down for unlawful reasons.

representatives.

Defendant's witnesses disputed almost all of plaintiff's assertions concerning her applying for series editorial and sales positions. Sales Manager Short testified that he had a conversation with the plaintiff at a sales convention, but he denied that she applied for a sales position or that he told her that women were not hired in sales positions. He admitted that in 1972 A & B's College Division sales force of over forty people had only one woman, that in 1973 there were only two women out of over forty, and by 1975 there were only approximately five women sales representatives.[8] Barcomb and Roberts similarly denied making statements explicitly or implicitly suggesting that women would not be made Series Editors at A & B.

In sorting out this conflicting testimony and the varying assertions concerning defendant's hiring and promotion policies in regard to sales and series editorial positions, I find it hard to escape the conclusion that the company in large part excluded women from its sales force and, as a result, from series editorial positions. Statistical information concerning the sales force was given above. Defendant's own evidence (see Ex. 60) shows that A & B employed eleven Series Editors between 1971 and 1974, and all of them were men. "Statistics concerning the general atmosphere of discrimination, although not conclusive, are usually relevant to show that the same employer discriminated against an individual plaintiff." *Lamphere*, *supra*, at 9.[9] Although associate and regular

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8. This testimony is somewhat at variance with documentary evidence. Defendant's Supplemental Answers to Interrogatories, which were introduced at trial by plaintiff, showed four female sales representatives in the College Division as of January 1, 1974, three weeks before plaintiff's conversation with Short, and seven women sales representatives as of December 1, 1975.

9. The statistics provided here are incomplete without additional information "as to the number of qualified women in the relevant labor pool," *Lamphere*, *supra* at 9. "The statistics, though striking upon first reading, may simply reflect an absence of qualified female applicants, rather than pervasive sex discrimination." *Id.* It is worth noting in this regard that the plaintiff provided examples of only two women who had applied for sales positions. Plaintiff's witness Anne Carlyle testified that she applied to become and was made a sales representative.

Series Editors received pay similar to plaintiff's as a Basic Books Editor, Senior Series Editors received considerably higher pay (see Ex. 60) and these senior positions were apparently closed to women.

The statistics, however, are not by themselves adequate to show that defendant intentionally discriminated against plaintiff in denying her a sales and/or series editorial position. I conclude that plaintiff has failed to carry her burden of showing intentional discrimination because plaintiff has failed to show that defendant's proffered legitimate reasons for its actions are pretextual. Defendant has argued, first, that plaintiff did not meet either of the two requirements for a sales position—having a college degree and some sales experience—and that plaintiff never applied for a sales position. Plaintiff's deposition testimony (II-52 to II-55) supports this latter suggestion, and also contradicts plaintiff's courtroom testimony suggesting that Short said anything explicitly to indicate that women were not hired for sales positions. I find here that plaintiff has failed to show that defendants stated reasons for not hiring her in a sales position—her lack of credentials and her failure to apply for a sales position—are pretextual.[10]

Defendant argues that it did not hire plaintiff as a Series Editor because she did not possess the job qualifications to become a Series Editor. The qualifications she lacked were: at least one year's experience as a college textbook salesperson or acquisitions editor; a four-year college degree; and skills relating to people. Clearly plaintiff did not have the sales experience or college degree. It is just as clear that by mid- and late 1974, when plaintiff expressed her

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Ft. no. 9 cont.

Plaintiff's testimony concerning her own request to become a sales representative is contested, although plaintiff's Exhibit 5, a memorandum from a Series Editor to plaintiff, says that A & B's Canadian Sales Manager expressed interest in having plaintiff become a sales representative in his territory following her "excellent participation" at the National Sales Meeting.

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10. In this instance, the defendant's stated reason is a negation of the elements of plaintiff's prima facie case. Therefore, the finding here that defendant's proferred reason is not pretextual is also a finding that plaintiff has not established her prima facie case.

desire to become a Series Editor, the defendant had good cause to doubt her ability to get along with people both within and outside the company, as will be discussed in Section VII below.

I conclude that plaintiff has failed to show that defendant's stated reasons for not hiring her in a series editorial position are pretextual. On all the evidence before me, plaintiff has failed to meet her burden of proof on this claim.

On October 3, 1974, plaintiff was given the choice by William Bokermann of resigning from A & B and continuing to work on current projects on a freelance basis or remaining a full time employee, but on a three month probation. Plaintiff chose probation. On January 17, 1975, shortly after the probation had ended, Bokermann informed plaintiff that she was fired. Plaintiff claims that she was placed on probation and then fired because of her "continual requests for promotions, pay raises and better working conditions comparable to those of her male counterparts."[11] Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶ 23. Defendant claims that plaintiff was placed on probation and fired "for being a disruptive influence within her department—she was argumentative in her relations with co-workers and authors and other persons inside and outside the Company and she demonstrated a marked inability to conform to and work within an office environment and routine without disturbing her co-workers." Defendant's Memorandum of Law in Support of Motion for Dismissal 18. Testimony from witnesses, plaintiff's own testimony and my observations of her during the twelve day trial, and my review of documentary evidence concerning the probation and firing convince me that defendant's version is the more credible of the two, and I thus find that plaintiff was not placed on probation and then fired in a manner calculated to retaliate against rightful requests by plaintiff for treatment equal to that received by male workers.[12]

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11. Plaintiff's claims that she was denied wages and working conditions comparable to males in similar jobs at A & B, to the extent that these claims have not already been discussed above, will be reviewed in Section VIII below.

12. As will be discussed in Section VIII below, the evidence does not support a claim that plaintiff received treatment in terms of wages or working conditions that was unequal to that received by her male co-workers at A & B.

Testimony from both plaintiff and defense witnesses strongly indicates that plaintiff had disputes with and was perceived as disruptive by numerous of her co-workers. Sally Liflin, whose office at one time was near plaintiff's, testified that plaintiff's conduct was loud and distracting. Lawrence Feinberg, called by plaintiff, acknowledged that plaintiff was capable of being loud and was very vocal in expressing her dissatisfactions with a supervisor she felt was not competent. He testified that she did not get along well with at least two of her supervisors. Melinda Cowles, a member of the design department whose office was next to plaintiff's for eight months, testified that plaintiff was loud and argumentative. Cynthia Hartnett, who began at A & B in 1973 as an assistant production editor and who had an office near plaintiff's toward the end of plaintiff's time at A & B, complained to Bokermann about plaintiff's playing a radio during working hours and testified to being annoyed by plaintiff's loud, long telephone conversations. Allen Workman, who worked with plaintiff as a co-Basic Books Editor, found plaintiff's work to be of high quality but admitted that people seemed to "breathe easier" after plaintiff was fired. Judith Fiske, who was plaintiff's first supervisor and then was plaintiff's co-worker as a Production Editor, testified that plaintiff's supervisor received a number of complaints from other workers about plaintiff's being loud and taking up much of their time, and, finally, that when plaintiff was fired, there was a "sigh of relief" at A & B and "a considerable amount of tension left." Jane Dahl, who was an Assistant Production Editor in 1974 when she shared a telephone with plaintiff, testified that plaintiff engaged in loud, personal phone calls for several hours a day and was very argumentative with co-workers. "Everyone breathed a great sigh of relief," Dahl testified, when plaintiff was fired.

I do not conclude from this testimony that plaintiff was a bad worker, that she was disliked by most of her co-workers, or that she was necessarily at fault in those cases in which she did have disputes with co-workers and supervisors. But the conclusion is inescapable that, in an environment that was often loud and contentious, plaintiff was among the loudest and most contentious

actors and that plaintiff did have considerable trouble getting along with a fair number of her co-workers and with others. William Bokermann, whose testimony I found quite credible, seemed to sum up plaintiff's strengths and weaknesses well when he testified that she was intelligent, hard working and knowledgeable, but that she had problems getting along with people.[13] Documentary evidence strongly supports both these contentions, as do my observations in court.

It is also clear that, once on probation,[14] plaintiff did little or nothing to modify her behavior, see Exhibits 35, 37, and 40, so that I can only conclude that her termination was a response by management to the continuation of problems that had resulted in probation. It is the case, of course, that if plaintiff was fired because she was disruptive, interfered with the work of others and was unable to get along with co-workers and others, then she was fired for a legitimate, nondiscriminatory reason. *See, e.g., Correa* v. *Nampa School District No. 131*, 645 F.2d 814, 816 (9th Cir. 1981). I find here that defendant has provided a legitimate, nondiscriminatory reason for placing plaintiff on probation and then firing her, and that plaintiff has not exposed this reason as pretextual. On all the evidence before me, I find that plaintiff has failed to meet her burden of proof on this claim.

VIII

Plaintiff has raised general claims that she was paid less than men doing similar work at A & B and that she was denied appropriate benefits, including travel rights and decent office accommodations. These claims can be disposed of quickly. Plaintiff was hired on April 10, 1972 as a Production Editor at a salary of $10,5000. Three males who remained at A & B at least

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13. Bokermann also testified to receiving complaints about plaintiff from various people, in addition to the witnesses discussed above, within and outside A & B.

14. Plaintiff has made a credible though disputed claim that probation was virtually unknown at A & B in 1974 and seemed, in effect, invented for her. Even if this is true, it does little to further plaintiff's discrimination claim, since I find that defendant had a legitimate (non-discriminatory) reason for disciplining her, whether their method of discipline was unique or traditional to the company.

until plaintiff's last salary increase became Production Editors around the same time. Larry Feinberg was hired in late July, 1972, at $9,500 per year, or $1,000 less per year than plaintiff.[15] William Bokermann was hired on July 31, 1972 as a Production Editor at a salary of $12,500, or $2,000 more per year than plaintiff. Russell Mead, hired earlier, apparently became a Production Editor on August 1, 1971, at a salary of $10,400, almost identical to plaintiff's starting salary, and was still making $10,400 eight months later when plaintiff was hired. Salary discrepancies at A & B were apparently based in large part on salary history, with Bokermann receiving a higher starting salary than plaintiff because of his salary at his last job. Two years later, in August, 1974, plaintiff was a Basic Books Editor making $14,030[16] yearly. Mr. Feinberg, who was by then a Senior Production Editor, was paid a yearly salary of $12,554. Russell Mead, a Production Editor, was paid $13,058 as of August, 1974. William Bokermann, who was made Production Manager for the College Division in May, 1973, was paid $18,825 per year as of May, 1974. My conclusion from the documentary evidence and the testimony is, that while some A & B employees like Bokermann may have received unusually fast promotions and rapid salary increases outstripping those received by plaintiff, plaintiff received an initial salary and salary increases commensurate with those of male A & B employees doing the same or similar work.

As for office space, the abundance of testimony heard on this issue convinced me that most offices at A & B's College Division were crowded and inelegant, with plaintiff faring no worse than most others. Defendant's refusal to allow plaintiff to travel to conventions and undertake other travel was strictly in keeping with its policy of authorizing only Series Editors to travel.

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15. Feinberg's experience and educational credentials were at least equal to plaintiff's.

16. The other Basic Books Editor, Alan Workman, was also making a yearly salary of $14,030 in August, 1974. Workman's educational credentials were superior to plaintiff's and he had been employed by A & B for a number of years longer than had plaintiff.

I conclude that the claims stated here must fail because plaintiff has failed to show that she experienced discriminatory treatment in comparison with similarly situated men in terms of salary, office accommodations, or travel privileges.[17]

IX.

Defendant has claimed that this court lacks jurisdiction over any claims that allege discriminatory acts that occurred more than three hundred days beore plaintiff filed her claim in early 1975 with the Equal Employment Opportunity Commission. It is not necessary for me to reach this claim, since I find against plaintiff and for defendant on the merits of all plaintiff's claims, and order the action dismissed.

Robert E. Keeton
United States District Judge

17. Plaintiff has made a variety of other assertions that suggest that she was a victim of sex discrimination, including: sexist remarks made by a co-workers; a sexual advance made by a co-worker; lack of promised six-month review; lack of overtime pay. The first two assertions were made for the first time in testimony at trial, are uncorroborated and, in any case, fail to show that plaintiff experienced sex discrimination—that is, disparate treatment—by her employer. As to the six-month review and overtime pay, the evidence suggests that A & B employees above clerical status received neither six month reviews nor overtime pay.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

BARBARA JOHNSON,
Plaintiff

v.

CIVIL ACTION
NO. 77-3325-K

ALLYN AND BACON, INC.,
Defendant

ORDER OF DISMISSAL

September 8, 1982

KEETON, D.J.

In accordance with the Memorandum of this Court issued on September 3, 1982, it is ORDERED:

This action is hereby dismissed

By the Court:
GEORGE F. McGRATH, CLERK

Ellen M. Hayes
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 82-1886
83-1048

BARBARA C. JOHNSON,

Plaintiff, Appellant,

v.

ALLYN & BACON, INC.,

Defendant, Appellee.

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Robert E. Keeton, *U.S. District Judge*]

Before CAMPBELL, *Chief Judge*,
BOWNES, *Circuit Judge*,
and PEREZ-GIMENEZ, *District Judge*.

ORDER OF COURT

Entered May 29, 1984

Plaintiff-appellant, Barbara Johnson, seeks rehearing on the disparate impact issue presented in her appeal, which we rejected, first, for her failure to raise it before the district court (pages 17-19 of Opinion), and, second, on the merits, for failure to satisfy her burden of proof (page 19, n. 8). Johnson also seeks relief from our award of double costs to appellee, Allyn & Bacon, Inc. (Allyn & Bacon). The petition for rehearing is denied. For the purpose of clarifying our initial opinion we issue this order.

Johnson contends in her petition that this court erred when it rejected her disparate impact argument because (1) she raised the disparate impact claim below, and (2) she was not required to elect between the disparate treatment and disparate impact theories during the course of the trial. We consider each claim separately.

First, we address Johnson's claim that she in fact raised the disparate impact theory before the district court in paragraph 11 of her *amended* complaint. Johnson's argument in this respect simply misses the point. As we explained in our initial Opinion, (p 5, n. 2) Johnson's motion for leave to file an amended complaint was never granted, and consequently, the amended complaint was never properly before the district court. In fact, the district court sustained Allyn & Bacon's objection to the introduction of any proof outside the scope of the original complaint.[1] Moreover, counsel for Allyn & Bacon specifically pointed out during opening and closing statements that the case was exclusively a disparate treatment case (see transcript, pp. 32 and 1659). Johnson's trial counsel did nothing to correct defense counsel's statements. In fact, at no point did Johnson's trial counsel contend the disparate impact approach had to be followed. Thus, the fact is that Johnson *brought* and *tried* her case as a disparate treatment case, and such it remained on appeal.

Second, we address Johnson's claim that whether or not she raised the disparate impact theory below, the district court should have analyzed this case under the disparate impact theory—in

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1. The scope of the original complaint was limited to alleged retaliatory actions taken by Allyn & Bacon against Johnson in response to her opposition to unlawful and discriminatory practices by the company. No claim based on the disparate impact theory was asserted therein.

addition to the disparate treatment theory —because she did not have to elect between both theories. We agree with Johnson that a claimant need not elect between the disparate treatment and disparate impact theories at any stage of the prosecution of his or her case. *See*, *Wright* v. *National Archives & Record Service*, 609 F.2d 702, 710-11 (4th Cir. 1979) ("no procedural election between [the disparate treatment and disparate impact theories] is required of a claimant at either pre-trial, trial or appellate stages"). However, what this means is simply that the theories constitute "alternative [grounds] upon which a right to relief under Title VII may be established in a given case", *Id.*, and, as such, both may be asserted at the same time if claimant so desires. *See* F.R.Civ.p. 8(3)(2). On the other hand, a district court does not have to analyze an employment discrimination case under *both* theories when only one of them is asserted by the claimant and no proof is adduced at trial to enable the court to adequately analyze the case under the other. Under the circumstances of this case, it does not appear that *Wright* applies. This was not a case where claimant was forced to choose between the two theories but where she herself pressed only one.

Furthermore, appellant's argument that the district judge "made a finding, not based on statistics, that Allyn & Bacon's facially neutral policy (sales experience) excluded women from its series editorial positions" is simply wrong. It is true that Judge Keeton found "it hard to escape the conclusion that [Allyn & Bacon] in large part excluded women from its sales force, and as a result from series editorial positions." However, the quoted language from the district judge's opinion does not, as appellant would have us hold, amount to a finding relevant to disparate impact. In fact, that statement cannot amount to such finding since appellant did not adduce any proof during the trial of this case to the effect that the sexual imbalance in Allyn & Bacon's sales force and series editorial staff was *caused* by the selection devices employed by Allyn & Bacon. *See*, *Pouncy* v. *Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982).

In *Pouncy*, the Fifth Circuit explained that the disparate impact model applies only when an employer employs a selection criterion

(or other specific procedure) that can be shown to have a *causal connection* to a class based imbalance in the work force. 668 F.2d at 800. Under that standard, an aggrieved party must prove a disparate impact *due* to the selection procedure. The *Pouncy* court emphasized that "[i]dentification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy." 668 F.2d at 801. From our review of the record in the case before us, it seems clear that the nature of the evidence presented by Johnson at trial could not establish a case of employment discrimination based on the disparate impact model. Hence, even if Johnson had raised the disparate impact theory before the district court, she would not have prevailed in view of her failure to meet her burden of proving that a facially neutral selection device produced a significantly adverse impact on women.

Appellant also criticizes our awarding of double costs. While we think this appeal is extremely weak in terms of presenting any issue of substance, we shall give appellant and her attorney the benefit of the doubt. Accordingly, we modify our order so as to award regular, not double costs against appellant.

Appellant's petition for rehearing is hereby denied, but with regular, not double costs, to be granted appellee.

By the Court:
Francis P. Scigliano
Clerk.

[cc: Messrs. Collins & Canoni.]

Office-Supreme Court, U.S.
FILED
OCT 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-426

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA JOHNSON,

Petitioner,

—v.—

ALLYN & BACON, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

October 19, 1984

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QUESTIONS PRESENTED

1. Whether a Title VII plaintiff may bring and try her case under one legal theory (disparate treatment) before the district court and then seek a remand on appeal to re-try her case under a different legal theory (disparate impact)?

2. Whether the First Circuit's ruling that petitioner would have failed to meet her burden of proof under the disparate impact theory even if petitioner had raised that theory below was clearly erroneous?

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13 Moore, *Federal Practice*, 2d ed., 1982, ¶ 817.21 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-426

BARBARA JOHNSON,

Petitioner,

—v.—

ALLYN & BACON, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

Respondent Allyn & Bacon, Inc.[1] submits this brief in opposition to petitioner's request that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit.

The September 3, 1982 opinion of the United States District Court for the District of Massachusetts is unofficially reported at 34 FEP Cases 795 and 30 EPD ¶ 33,065 and is reprinted at pages 31 through 48 of the Petition. The October 25, 1982

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1 In accordance with this Court's Rule 28, Allyn & Bacon, Inc.'s parent company is Esquire, Inc. whose parent company is 30th Century Corporation whose parent company is Gulf & Western, Industries.

Procedural Order of the District Court is reprinted at pages 18 to 21 of this Opposing Brief.

The March 29, 1984 decision of the United States Court of Appeals for the First Circuit is reported at 731 F.2d 64 (1st Cir. 1984) and is reprinted at pages 15 through 29 of the Petition. The May 29, 1984 decision of the First Circuit denying rehearing is unofficially reported at 34 FEP Cases 1742 and 34 EPD ¶ 34,417 and is reprinted at pages 51 to 54 of the Petition.

JURISDICTION

The District Court entered an Order of Dismissal on September 8, 1982. This order is reprinted at page 49 of the Petition. Petitioner then moved for a new trial and for amended and additional findings under F.R.Civ.P. 52 and 59 and the District Court entered a Final Order of Dismissal on November 30, 1982. This order is reprinted at page 17 of this Opposing Brief.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

(1) Supreme Court Rule 50.7

> ".7 In an appropriate instance, the Court may adjudge double costs."

(2) 28 U.S.C. § 1912

> "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

COUNTERSTATEMENT OF THE CASE

The basic facts of the case are set forth in the decisions of the District Court and the Court of Appeals. They will not be repeated herein.

When this suit was first instituted in 1977, petitioner claimed that she alone had been the victim of numerous acts of unlawful sex discrimination. These were disparate treatment claims and were so denominated by all parties, including petitioner's trial counsel. They were presented during a twelve-day trial before the Honorable Robert E. Keeton in June, July and August 1982. Judge Keeton dismissed all of petitioner's claims. Petitioner then moved for a new trial and requested additional and amended findings. Judge Keeton denied that motion.

On appeal to the First Circuit, petitioner (now represented by different counsel) argued (1) that the District Court had improperly rejected certain of her sex discrimination claims against respondent under the disparate treatment theory and (2) that she was entitled to a remand so she could re-try her case under the disparate impact theory. The First Circuit (1) affirmed the District Court's conclusion that "the ultimate decisions concerning Johnson were not based on Johnson's sex," thereby disposing of her disparate treatment claims, (2) held that, having brought and tried her case as a disparate treatment case before the District Court, petitioner could not raise for the first time on appeal the contention that she was entitled to a remand to re-try her case under a different legal theory (disparate impact) and (3) held that its own examination of the record convinced it that petitioner failed to meet the requirements of the disparate impact theory *even if* she had properly raised it before the District Court. Noting that petitioner had "absolutely failed to present any arguable reason why the district court erred in its disposition," that petitioner was basically restating arguments that the district court "properly rejected" and that petitioner's additional argument (the

disparate impact theory) "was not even presented to the district court," the First Circuit awarded respondent double costs under F.R.App.P. 38.

Petitioner filed a timely petition for rehearing raising only her disparate impact claim. The First Circuit denied this petition on two grounds—first, that petitioner had failed to raise her disparate impact claim before the District Court and, second, "on the merits" because petitioner had failed to satisfy her burden of proof under this disparate impact theory even if petitioner had raised that theory before the trial court. Although noting that it deemed petitioner's appeal to be "extremely weak in terms of presenting any issue of substance," the First Circuit decided, on rehearing, to give petitioner and her new counsel "the benefit of the doubt" and modified its order so as to award respondent regular, not double, costs.

In her petition before this Court, petitioner again merely restates the same arguments presented to and rejected by the First Circuit on two separate occasions, first, on the appeal and, second, on the petition for rehearing. Respondent contends that the First Circuit properly rejected those arguments and that petitioner's claim that the First Circuit's decision conflicts with decisions by other courts of appeals is simply wrong. Respondent further contends that there are no special and important reasons for granting certiorari in this case since it involves a unique factual and procedural situation and issues that are unlikely to recur. Moreover, the First Circuit properly rejected petitioner's claims under *both* the disparate treatment and disparate impact theories *on the merits* so petitioner's "question presented for review" is inaccurate and misleading. Finally, respondent respectfully requests that this Court award it double costs under this Court's Rule 50.7 and 28 U.S.C. § 1912.

REASONS FOR DENYING THE WRIT

POINT ONE

PETITIONER FAILED TO RAISE THE ISSUE OF DISPARATE IMPACT BEFORE THE DISTRICT COURT

It is a well-established rule of appellate review that, in the absence of exceptional circumstances, an issue or argument not raised before a district court will not be heard on appeal. The fundamental purpose of this rule is to promote the finality of judgments and to conserve judicial resources. In accordance with this rule, the First Circuit correctly found that petitioner improperly sought to raise the issue of disparate impact for the first time on appeal, after proceeding at trial entirely under the disparate treatment theory.

The First Circuit's refusal to consider petitioner's arguments under the disparate impact theory, on the ground that the issue had not been properly raised before the trial court, not only comports with numerous other decisions within that circuit but is also consistent with the approach applied throughout the circuits when litigants seek to raise new issues on appeal. See *Scott* v. *Pacific Maritime Association*, 695 F.2d 1199, 1203-1204 (9th Cir. 1983) (where employee, in Title VII case, failed to raise issue of continuing violation); *Payne* v. *McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1144-1146 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) (where employer, in Title VII case, sought to raise issue of whether the form of plaintiff's activities justified refusal to rehire); *Manning* v. *Lockhart*, 623 F.2d 536, 538 (8th Cir. 1980) (a civil rights action, where prisoner sought to raise issue of denial of parole); *Harrington* v. *Vandalia-Butler Board of Education*, 585 F.2d 192, 197 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979) (a Title VII case, where employee sought to raise issue of the propriety of a damage award); *Sandford* v. *R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 175-176 (4th Cir. 1978) (plaintiff in § 1981 action attempted to raise

a contrary position on appeal); *Gibson* v. *Kroger Company*, 506 F.2d 647, 653 (7th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975) (where plaintiff, in Title VII case, sought to raise an additional jurisidictional basis).

In this case, the First Circuit properly found that petitioner's case "was brought and tried under a disparate treatment theory" (Petition, p. 27). Significantly, petitioner cannot and does not dispute the First Circuit's finding (Petition, pp. 27, 52) that at no point did her trial counsel contend that the disparate impact approach should be followed. While petitioner refers to certain allegations in her original complaint (Petition, p. 9), she fails to note that before the trial began her trial counsel proposed a finding of fact and conclusion of law that "the unlawful acts of sex discrimination perpetrated by the defendant upon the plaintiff were willful and intentional" (No. 32). Of course, discriminatory intent is an issue only under a disparate treatment analysis.

Petitioner also does not controvert the First Circuit's express finding that respondent's counsel "specifically pointed out that the case was a disparate treatment case, and no objection to Allyn & Bacon's counsel's statement was forthcoming from Johnson's counsel" (Petition, pp. 27, 52). Respondent's counsel stated during his opening statement to the district court that ". . . this is what is known in Title 7 parlance as a disparate treatment case" (R. 32, Opposing Brief, p. 24). Again, during his closing argument, respondent's counsel stated: "The Court is aware, and I believe it is conceded by the Plaintiff, that in a disparate treatment case such as the present case, Plaintiff must show intentional discrimination" (R. 1659, Opposing Brief, p. 26). Petitioner's trial counsel not only did not object to these statements but in her own closing statement to the District Court specifically affirmed that she was raising a disparate treatment claim ("Mrs. Johnson claims disparate treatment against her was indeed intentional by her employer, Allyn & Bacon", R. 1688-89, Opposing Brief, p. 27). Thus, the First Circuit was entirely correct when it conducted its own review of the record herein and concluded that " . . . the fact

is that Johnson *brought* and *tried* her case as a disparate treatment case, and such it remained on appeal" (Petition, p. 52, emphasis in original).

Petitioner also misstates the record when she refers to her 1979 motion for leave to file an amended complaint. While petitioner acknowledges that this motion was never granted (Petition, p. 8), she claims the trial judge "established on the record the rule that he would take evidence under the allegations *of the amended complaint* until such time as there was an objection to him doing so . . . ." (*Ibid.*). After a lengthy discussion of the subject (R. 1-15), the district judge ruled the parties should proceed with their proof and the respondent should object to any proof it believed was "going outside the original complaint" (R. 11, Opposing Brief, p. 22). Thus, the First Circuit was correct when, after reviewing the record, it concluded the District Court had sustained respondent's objection to the introduction of any proof outside the scope of the original complaint (Petition, p. 52).

After the District Court's September 3, 1982 decision, petitioner filed a motion seeking a new trial and amended and additional findings under F.R. Civ. P. 52 and 59. In that motion, petitioner did *not* raise the claim that the trial judge should have applied the disparate impact theory. This motion followed the district judge's decision where he had held (Petition, p. 33) that petitioner must show intentional discrimination to prevail on one or more of her claims and, also, had specifically referred to the disparate treatment theory (Petition, p. 48, n. 17). Moreover, petitioner never raised the trial judge's alleged departure "from the accepted and usual course of judicial proceedings with respect to amending complaints, even after trial . . ." (Petition, p. 11) either in her post-trial motions or before the Court of Appeals. This claim is presented for the first time before this Court and, as such, is not a proper issue for review.

POINT TWO

THERE IS NO CONFLICT BETWEEN THE FIRST CIRCUIT'S DECISION BELOW AND DECISIONS OF OTHER COURTS OF APPEALS

Rule 17.1(a) of the Rules of this Court sets forth as one of the grounds for granting a writ of certiorari that the decision below is "in conflict with the decision of another federal court of appeals on the same matter." This Court has traditionally declined to grant certiorari (1) to resolve a conflict between or among appeals courts over an issue that is unlikely to recur or that results from a unique factual or procedural situation or (2) if the alleged conflict can be explained by variations in the factual patterns among the cases involved. 13 Moore *Federal Practice*, 2d Ed., 1982, ¶ 817.21, p. SC 17-22.

Petitioner correctly states that a litigant may assert both disparate treatment and disparate impact theories as alternative grounds for relief in the same case. But, as the First Circuit cogently noted, a District Court is not obligated to analyze every Title VII case under both theories "when only one of them is asserted by the claimant and no proof is adduced at trial to enable the court to adequately analyze the case under the other [theory]" (Petition, p. 53). This case involves precisely such a unique factual and procedural situation. Such situations are uncommon and are not likely to recur.

Petitioner claims (Petition, p. 13) there is a "clear" conflict between the First Circuit's holding and certain holdings by the Fourth Circuit. Nothing could be further from the truth. Petitioner cites, for example, *Wright* v. *National Archives & Records Service*, 609 F.2d 702 (4th Cir. 1979). However, while the Fourth Circuit did state in that case that disparate treatment and disparate impact theories could be urged as alternative grounds for relief in the same case, the Fourth Circuit was careful to state this would *only* be true where both theories were first properly pleaded by the plaintiff under F.R. Civ. P. 8(e)(2) and then

sufficiently supported by evidence under F.R. Civ. P. 41 (609 F.2d at 711). This critical portion of the Fourth Circuit's discussion was omitted from the quotation from the *Wright* case presented in the Petition. The instant case presents very different facts since herein petitioner's case was neither pleaded nor tried as a disparate impact case[2] and since petitioner did not adduce any proof to enable the trial court to analyze her case under the disparate impact theory. The First Circuit specifically held that *Wright* was inapplicable for these very reasons (Petition, p. 53), and the Petition contains no valid arguments to the contrary.

POINT THREE

PETITIONER HAS NOT SHOWN THAT THE FIRST CIRCUIT'S DETERMINATION THAT SHE FAILED TO SATISFY HER BURDEN OF PROOF UNDER THE DISPARATE IMPACT THEORY IS CLEARLY ERRONEOUS

The Petition herein proceeds on the assumption that the First Circuit "did not address the merits" of petitioner's disparate impact argument (Petition, p. 7) and dismissed her argument "out of hand, without reaching the merits" (Petition, p. 8) because she had not raised the argument before the trial court.

This grossly misstates the First Circuit's rulings. In its initial decision, the First Circuit *did* reach the merits of this claim. It stated (Petition, p. 27, n.8) that:

> "Our examination of the record convinces us that, *even if the disparate impact theory had been followed below*,

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2 It is the rule in the Fourth Circuit and elsewhere that, where a plaintiff's claims are limited to disparate treatment claims, a District Court need only analyze the case under the disparate treatment model. *Kralowec* v. *Prince George's County, Maryland*, 503 F. Supp. 985, 993 (D. Md. 1980), *aff'd*, 679 F.2d 883 (4th Cir.), *cert. denied*, 459 U.S. 872 (1982); *Brown* v. *ASD Computing Center*, 519 F. Supp. 1096, 1110 (S.D. Ohio 1981).

> Johnson failed to meet her basic requirement of proving that Allyn & Bacon employed a selection device which, although facially neutral, produced a significantly adverse impact on women" (emphasis added).

If there could be any doubt as to the Court of Appeals' position, it was dispelled by the Court's decision on rehearing. After noting (Petition, p. 52) that it had rejected petitioner's disparate impact claim on two separate grounds ("first, for her failure to raise it before the district court and, second, *on the merits*, for failure to satisfy her burden of proof", emphasis added), the First Circuit stated:

> "From our review of the record in the case before us, it seems clear that the nature of the evidence presented by Johnson at trial could not establish a case of employment discrimination based on the disparate impact model. Hence, *even if Johnson had raised the disparate impact theory before the district court*, she would not have prevailed in view of her failure to meet her burden of proving that a facially neutral selection device produced a significantly adverse impact on women" (Petition, p. 54, emphasis added).

Petitioner's assertion before this Court that the First Circuit did not reach the merits of her disparate impact claim is simply wrong.

Petitioner's disparate impact argument also founders for yet another reason. She claims (Petition, p. 7) the District Court found there were *two* requirements for a series editor's job—a college degree and previous sales experience. She then argues that, since respondent had previously waived her own lack of a college degree for other positions she had held, she was really denied a series editor's job because the single remaining requirement (sales experience) was a facially neutral policy that had a significant adverse impact on women.

Among the problems with this argument is that petitioner conveniently ignores the fact that both the District Court (Petition, p. 43) and the Court of Appeals (Petition, p. 25)

found there were *three* requirements for a series editor's job. These were (1) a four-year college degree, (2) at least one year's experience as a college textbook salesperson or acquisitions editor and (3) skills relating to people. Petitioner lacked not only the requisite college degree and the sales experience but, as the District Court expressly found: "It is just as clear that by mid- and late 1974, when plaintiff expressed her desire to become a Series Editor, the defendant had good cause to doubt her ability to get along with people both within and outside the company . . ." (Petition, pp. 43-44). In fact, as both the District Court and the Court of Appeals noted (Petition, p. 43, n.10, 25-26), the District Court's finding that petitioner had not proven she was qualified for a Series Editor's job negated one of the elements of her *prima facie* case and "thus was also a finding that Johnson did not establish her *prima facie* case" (Petition, p. 26).

There can be no dispute that petitioner did not meet this third requirement for a Series Editor's job. She challenged the District Court's adverse finding on appeal and lost. The Court of Appeals expressly held: "The finding that Johnson was unable to get along with her co-workers and authors is based upon sufficient evidence and cannot be said to be clearly erroneous" (Petition, p. 26). Petitioner's challenge was that this finding was erroneous as a matter of law. According to the First Circuit, she made "little or no effort to show that the district court drew the wrong conclusions from the evidence before it" (Petition, p. 16, n.1) and "has not even attempted to show that the district court's conclusion is clearly erroneous" (Petition, p. 26). As petitioner cannot and does not challenge those findings before this Court, she must be held to be bound by them for the purposes of this Petition.

Petitioner also errs when she states (Petition, p. 7) that the District Court made an "explicit finding" that respondent in large part excluded women from its sales force and, as a result, from series editorial positions. The Court of Appeals described this argument as "simply wrong" (Petition, p. 53). It stated that the language from the District Court's opinion "does not,

as appellant would have us hold, amount to a finding relevant to disparate impact" (Petition, p. 53). As the Court of Appeals also held, petitioner never adduced any proof during trial "to the effect that the sexual imbalance in Allyn & Bacon's sales force and series editorial staff was *caused* by the selection devices employed by Allyn & Bacon" (Petition, p. 53, emphasis in original).

To establish a *prima facie* case of discrimination under the disparate impact theory, a plaintiff must show that a specific selection procedure has "a causal connection to a class based imbalance in the work force" *Pouncy* v. *Prudential Insurance Company of America*, 668 F.2d 795, 800 (5th Cir. 1982). The Court of Appeals below properly relied on *Pouncy* (Petition, pp. 53-54) and the analysis of disparate impact claims contained in that case as a further reason for rejecting petitioner's disparate impact claims herein.

Petitioner again relies exclusively on statistics presented at the trial that between five and seven of respondent's forty College Division sales people were females and that all eleven of the series editors were male (Petition, p. 42). Both the District Court and the Court of Appeals found this statistical evidence[3] was "incomplete" since it did not also include information as to the number of qualified women in the relevant labor market (Petition, pp. 25, 42). See, *Lamphere* v. *Brown University*, 685 F.2d 743, 750 (1st Cir. 1982). In addition, as the District Court also noted (Petition, p. 42, n.9), petitioner only presented evidence as to two female applicants for sales positions. One (Anne Carlisle, a witness called by plaintiff) testified she applied for and was given a sales representative's position. Petitioner herself was the second applicant. The evidence showed that, although one of respondent's sales managers had expressed interest in having petitioner apply for a sales representative's job, petitioner withdrew her

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3 Petitioner again cites (Petition, p. 9) *Lee* v. *Russell County Board of Education*, 684 F.2d 769 (11th Cir. 1982). This case is inapposite for the reasons set forth by the First Circuit (Petition, p. 20, n.6).

"application" because she would have had to accept a lower salary as a sales representative and she did not want to do so.

The Court of Appeals, in agreement with the District Court, found that petitioner's statistical arguments "are not adequate to show discrimination" under either the disparate treatment or disparate impact theories (Petition, pp. 25, 27-28, n.8). Petitioner does not cite any contrary authorities.

The First Circuit carefully and painstakingly evaluated petitioner's disparate impact claim *on the merits* and found it to be legally and factually deficient. We submit that the First Circuit correctly articulated and applied the substantive legal analysis of the disparate impact theory. We submit further that the First Circuit's articulation and application of the disparate impact theory, given the facts of this case, is consistent with decisions in other circuits. See *Liberles* v. *County of Cook*, 709 F.2d 1122, 1130-1132 (7th Cir. 1983); *Mortensen* v. *Callaway*, 672 F.2d 822, 824 (10th Cir. 1982); *Contreras* v. *City of Los Angeles,* 656 F.2d 1267, 1275-1280 (9th Cir. 1981); *Johnson* v. *Uncle Ben's Inc.*, 657 F.2d 750, 752-753 (5th Cir. 1981); *Harris* v. *Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981). Moreover, the First Circuit's interpretation and application of the disparate impact standard is in full accord with the principles expressed in decisions of this Court. See *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

POINT FOUR

THIS COURT SHOULD AWARD RESPONDENT DOUBLE COSTS

Both Rule 50.7 of this Court's Rules and 28 U.S.C. § 1912 authorize this Court to award respondent double costs. We submit that this is an appropriate case for double costs. The Court of Appeals awarded double costs in its initial decision under F.R. App. P. 38, stating:

> "[Johnson] has absolutely failed to present any arguable reason why the district court erred in its disposition. She basically restates arguments that the district court properly rejected. Her additional allegation is based on a theory which was not even presented to the district court. Some penalty should attach to taking up our time with such a perfunctory appeal. Thus, we believe in the circumstances that appellee is entitled to recover double costs under F.R. App. P. 38" (Petition, p. 29).

On rehearing, the Court of Appeals modified this order to allow only regular costs. However, it did so only because it wanted to give petitioner and her new counsel "the benefit of the doubt". The Court expressly noted its opinion that "this appeal is extremely weak in terms of presenting any issue of substance" (Petition, p. 54).

We submit that petitioner is no longer entitled to "the benefit of the doubt." She has filed a petition for certiorari with this Court despite two prior express judicial warnings against taking up an federal appeals court's time with "a perfunctory appeal" and for presenting an appeal that is "extremely weak in terms of presenting any issue of substance." She has again only repeated the same perfunctory and extremely weak arguments that she presented to the Court of Appeals below. Her Petition is not only completely lacking in substance but in many instances seriously misstates the rulings made below. We submit this is an appropriate case for the imposition of the sanction of double costs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied and respondent should be awarded double costs.

Dated: October 19, 1984

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-3325-K

BARBARA JOHNSON,

Plaintiff,

v.

ALLYN AND BACON, INC.,

Defendant.

FINAL ORDER
November 30, 1982

KEETON, D.J.

Defendant's Motion to Amend Judgment to Award Attorney's Fees having been denied by order of November 23, 1982, and

Plaintiff's claims for attorneys' fees having been denied in the Order of September 3, 1982,

It is ORDERED:

This action is hereby dismissed.

By the Court:

GEORGE F. McGRATH, *Clerk*

/s/ ELLEN M. HAYS
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-3325-K

BARBARA JOHNSON,

Plaintiff,

—v.—

ALLYN & BACON, INC.,

Defendant.

October 25, 1982
Procedural Order

Plaintiff filed a suit on November 1, 1977, charging her former employer with unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Following a twelve-day trial held in this court during parts of June, July, and August of this year, I found against the plaintiff and for the defendant on the merits of all plaintiff's claims, and I ordered the action dismissed.

The case is before me now on various motions by the plaintiff and one motion by the defendant. The motions, which will be discussed separately below, are: plaintiff's motion for a new trial; plaintiff's motion for the court to amend its findings, make additional findings, and amend the judgment; plaintiff's motion for attorney's fees; and defendant's motion for attorney's fees. Defendant and plaintiff have each filed papers opposing the other's motions.

1. Plaintiff's Motion for a New Trial: Plaintiff argues that she is entitled to a new trial pursuant to Rule 59, Federal Rules

of Civil Procedure, because she was denied a "full and fair opportunity to cross-examine Defendant's witnesses William Boldermann and William Roberts adequately and sufficiently." Plaintiff's Motion for a New Trial at 1. I find that plaintiff was not denied this opportunity. Although I was forced repeatedly to urge plaintiff's counsel to confine questioning of Bokerman to relevant issues and did impose a time limit for cross examination, in fact I allowed plaintiff's counsel to go past that time limit until she had no further questions of Bokerman. As for Roberts, I note that both parties were held to time limits in the examination of this witness, and that plaintiff's cross examination took almost twice as long as defendant's direct examination. Finally, I must comment that no time limits on either direct or cross examination would have been necessary had plaintiff and her counsel even started to comply with my frequent requests and orders to them to be prepared in court and to limit their examination of witnesses to relevant subject areas. Had they done so, I suspect the trial would have been concluded in three to four days, instead of the twelve it took, with no loss of fairness to either party.

2. Plaintiff's Motion for the Court to Amend its Findings, Make Additional Findings, and Amend Its Judgment. The plaintiff makes two general arguments here. The first, presented in great detail and with many specific examples in her original motion, is essentially that I misconstrued the evidence in this case and, had I correctly understood the evidence, I would "have found for the most part in favor of the Plaintiff." Plaintiff's Motion under FRCP Rules 52(a) and 52(b) at 21. The short answer to this is that plaintiff has litigated her case, and that I have applied my best efforts to weighing the evidence and finding the facts and applying the law properly. The plaintiff, in a motion based on little more than a review of arguments already made, has offered me no cogent reason to change those findings and conclusions.

Plaintiff's second argument here, suggested in her addendum to her motion, is that a proper reading of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981)

requires that the defendant in a Title VII case "come forth with admissible evidence that the reasons for his/its actions are not pretextual but legitimate and nondiscriminatory ones." Plaintiff's Addendum at 6. If plaintiff believes that I used a standard that made it too easy for the defendant to meet its burden once plaintiff had established her prima facie case, I state here my conclusion that, in each situation where it was required, defendant "clearly set forth, through the introduction of admissible evidence, the reasons for [its employment decision]," *Burdine*, *supra* at 255, and plaintiff failed to show that defendant's reason was pretextual, leading me to conclude that plaintiff failed to meet her burden of proof.

3. Motion for Attorneys Fees: Under 42 U.S.C. § 2000e-5(k), the court in a Title VII case like this "may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs." Both plaintiff and defendant have moved for attorney's fees and both have requested a briefing schedule and a hearing. Plaintiff's motion for attorney's fees can be easily dismissed, since she is not the prevailing party. Just as clearly, defendant here is the prevailing party. Attorney's fees in a Title VII case may be awarded to a prevailing defendant only upon a finding that the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith. *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 421-22 (1978).

On the basis of the evidence currently before me, I find that plaintiff's action, although without merit, was not frivolous, unreasonable, without foundation, or brought in bad faith. *See, e.g.*, Section VI of my Memorandum of September 3, 1982. Defendant has requested a hearing on its motion for attorney's fees and leave to submit affidavits and other documents in support of its motion. Unless defendant intends to offer new evidence sufficient to show that plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith—that is, evidence not currently before the court and evidence not merely cumulative of evidence before the court—I will not award attorney's fees to defendant.

I therefore allow defendant thirty days to file a response disclosing whether or not it has new evidence sufficient to support an award of attorney's fees and, if so, to proffer a statement of what that evidence will be. Upon review of the proffer, if one is made, I will decide whether to allow a hearing.

ORDER

For the reasons stated above, plaintiff's motions for a new trial, for amended and additional findings and amended judgment, and for attorney's fees are denied.

Defendant is allowed thirty days to disclose whether it has new evidence sufficient to support an award of attorney's fees and to proffer a statement of what that evidence is.

/s/ ROBERT E. KEETON
United States District Judge

APPENDIX C

TRIAL TRANSCRIPT, June 22, 1982, pages 10-12

* * *

THE COURT: Now, the problem that confronts me is expounded by the fact that you have not complied with the spirit and purpose of my order for proposed findings in advance.

The findings you have submitted are not the kind of findings I must make as fact-finder when I render a judgment on this case. They are very conclusional.

I do not have the slightest idea what kind of proof you propose to offer in these matters. And, therefore, I cannot determine whether the defendant has or has not had reasonable notice and an adequate opportunity to prepare.

I could well justify, I think, a decision simply to deny your motion for amendment because of the lateness of its assertion and my notice to you in a conference after counsel had been changed that if you wished to press that amendment, you should bring it to my attention and let us get it out in the open **[page 11]** and get a ruling on it.

Now you bring it to my attention the morning of trial and with proposed findings that I am inclined to think do go beyond the scope of the original complaint. I don't quite understand how you argue that matters other than denial of raises, assignment to probation and discharge are within the scope of the original complaint.

I think I will propose to you that I deal with the matter in the following way, although I will hear you if either of you oppose this.

Let us proceed with the proof. If the defendant objects to the scope of any of the proof on the ground that it's going outside the original complaint and, therefore, raises the issue shortly as to whether the amendment is to be allowed, alert me to it as proof comes in, and I will rule.

Now, I might say to you that we're confronted with this problem because of the inadequate advance preparation by counsel and the failure to comply with my orders. I am always

troubled, however, by having cases decided on penalties for that kind of preparation rather than decided on the merits. And the general spirt of the rules in favor of allowance of amendment, as long as it is done with **[page 12]** fair notice to opposing counsel and they have an opportunity to respond, would lead me to be inclined to allow the amendment and deal with the issues on the merits unless it appears that there is not an adequate opportunity to prepare for it and to present responses and prove it.

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OPENING STATEMENT—MR. CANONI, pages 31-32

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Your Honor, you probably are quite familiar with Title 7 cases, but I think it will be appropriate for me just to say two words on the burden of proof and the question of intent because I think that's important in this kind of case.

The burden of proof, your Honor, is a tripartite situation. And the First Circuit Court has ruled on it, the Supreme Court has ruled on it. They've set it out rather succinctly. It operates in a fashion so that the plaintiff goes forward and makes—tries to make out a prima facie case of discrimination. The burden then shifts to the defendant.

Now, that is a burden solely of production. In other words, the burden on the defendant is simply to explain the action that the plaintiff has characterized. And courts have described it as the burden of articulating a legitimate non-discriminatory reason for the action.

Now, once the defendant does that, does the articulating, then the burden goes back to the plaintiff to prove that the defendant's articulated reason is not a true reason but a pretext and what is very important. Your Honor will probably expect, **[page 32]** the burden—the ultimate burden, the burden of persuasion, rests, remains with the plaintiff at that point so the plaintiff must prove the case. There are a number of First Circuit opinions that have set this standard out. So that the burden of persuasion always remains with the plaintiff.

The other point I would like to point out at the beginning of the trial, your Honor, is this is what is known in Title 7 parlance as a disparate treatment case. There are two kinds of cases under Title 7. There are disparate impact cases and disparate treatment cases. A disparate impact case is a case where a facially neutral policy such as a test or a high school requirement or something like that has a disparate impact on minorities or women or something like that. In such a situation intent is irrelevant or not important. However, when you shift

over to a disparate treatment case where the allegation is made that the employer did something to me because I am black or because I am a female, now in that kind of case the Supreme Court of the United States and the First Circuit have both held that in that kind of case the plaintiff must prove discriminatory intent. So I did want to emphasize to your Honor that those are the applicable standards.

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TRIAL TRANSCRIPT, August 18, 1982, pages 1658-1659

PROCEEDINGS

THE COURT: Good morning. I did want to confer with you yesterday, as I probably should have, about order of proceeding. But I infer that you have agreed that you would follow the Massachusetts custom under which the Defendant argues first, the Plaintiff then argues, rather than Plaintiff opening and having rebuttal.

MR. CANONI: That's correct.

THE COURT: All right. That's fine. You may proceed.

MR. CANONI: Your Honor, I would like to say two things. First of all, Ms. Doona and I have agreed we will waive the filing of briefs. We feel that the closing arguments would sufficiently pose the issues for your decision. So that this would be the last—

THE COURT: Very well.

MR. CANONI: And before I begin, I want to thank the Court and the Clerks for their courtesies and cooperation extended to me and my associate for accommodating the scheduling of the trial dates and the witnesses.

In the instant case, we have labored through eleven trial days to deal with what, in my judgment, are a series of claims that are frivilous and without merit. And on **[page 1659]** behalf of my client, I respectfully request this Court to enter a judgment dismissing the Plaintiff's complaint with prejudice and with costs. We, also, intend at the appropriate time to request an award of reasonable attorney's fees as provided under Title 7.

We have already submitted a brief on the Rule 41(B) motion that discusses the pertinent legal precedents. The Court is aware, and I believe it is conceded by the Plaintiff, that in a disparate treatment case such as the present case Plaintiff must show intentional discrimination. I will, accordingly, devote my attention today principally to the facts as developed through the 19 witnesses and the 62 exhibits.

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TRIAL TRANSCRIPT, August 18, 1982, pages 1687-1688

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THE COURT: Thank you.

Ms. Doona.

MS. DOONA: Thank you. Good morning, your Honor. At this time I wish to take the opportunity to thank the Court for its patience and courtesy extended to me and to my client during the days of trial. And I thank Mr. Clerk and the stenographer and my brother, Mr. Canoni.

This is a case that my client, Plaintiff, has [page 1688] alleged that she has been sexually discriminated against by the Defendant, Allyn and Bacon, a publishing firm. There has been many days of much testimony produced on—throughout this trial. And the thrust of the entire case has been by the Plaintiff that she has been discriminated against under the terms and conditions of her employment and retaliation for having complained about the terms and the conditions and the wages that discriminated against wages that she had received as a woman.

Mrs. Johnson has come forward here and has testified and has produced considerable amount of documentary evidence showing, she submits, that indeed Allyn and Bacon has discriminated against her because of her sex.

Now, as to the allegations of discrimination in the terms and the conditions of employment and in the assignment of wages that she received as opposed to those received by a male, I would like to outline exactly the testimony as I recall it to the best of my memory and hopefully, your Honor, I can capsulize it as truthfully and as clearly as was testified to by the individuals on that stand.

Mrs. Johnson claims disparate treatment against her was indeed intentional by her employer, Allyn and Bacon.

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